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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,573

INTERNATIONAL UNION OF MINE, MILL AND SMELTER WORKERS, *Appellant*

v.

GUY F. FARMER, et al., as Members of the National Labor Relations Board, *Appellees.*

Appeal from the United States District Court for the District of Columbia

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JOINT APPENDIX

I.

PLEADINGS, DOCKET ENTRIES AND OTHER PAPERS

26 Filed Feb. 9, 1955

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 583-55

INTERNATIONAL UNION OF MINE, MILL AND SMELTER WORKERS, 16th & Curtis Streets, Denver 2, Colorado, *Plaintiff*

v.

GUY FARMER, ABE MURDOCK, IVAR H. PETERSON, AND PHILIP RAY RODGERS, members of the NATIONAL LABOR RELATIONS BOARD, 330 C Street, S. W., Washington, D. C., *Defendants*

Complaint for Declaratory Judgment and Injunctive Relief

The plaintiff, International Union of Mine, Mill and Smelter Workers, by its attorneys, for its complaint against the defendants, alleges:

1. The Court has jurisdiction of this action under D. C. Code, sections 11-305 and 11-306, under 28 U. S. Code, section 1331, under section 10 of the Administrative Procedure Act, 5 U. S. Code, section 1009, and under the federal declaratory judgment act, 28 U. S. Code, sections 2201 and 2202.

2. The plaintiff, International Union of Mine, Mill and Smelter Workers, is an unincorporated labor organization which engages in collective bargaining for and in behalf of employed persons with respect to wages, hours, and conditions of employment. It has a membership of approximately 100,000, comprising workers engaged in the nonferrous metals and related industries in various parts of the United States and Canada. It is in collective bargaining relationships with hundreds of employers and

is party to agreements with such employers covering more than 100,000 workers.

3. The defendant Guy Farmer is the chairman of the National Labor Relations Board (hereinafter referred to as the Board), and the defendants Abe Murdock, Ivar H. Peterson, and Philip Ray Rodgers are the remaining members of the Board, there being a vacancy in the office of the fifth member of the Board. The Board is created by, and exercises its powers by virtue of, the National Labor Relations Act of 1935, 29 U. S. C. 151, et seq., as amended from time to time (hereinafter referred to, as amended, as the Act). The defendants have their principal office, and may be found, in the District of Columbia.

4. Under the Act, a labor organization may not be certified as the collective bargaining representative of
27 employees, and charges by it of unfair labor practices against employers may be processed, unless it has caused each of its officers to file with the Board affidavits, pursuant to and in the form provided by Section 9(h) of the Act, to the effect that he is not a member of or affiliated with the Communist Party, and that he does not believe in, and is not a member of or supports, any organization that believes in or teaches the overthrow of the United States Government by force or by any illegal or unconstitutional means. Under the Act, such affidavits are required to be filed with the Board annually, and also as officers are changed.

5. Beginning in or about August 1949, and thereafter at intervals of at least twelve months, the plaintiff duly filed with the Board the affidavits of all its officers, duly executed in accordance with Section 9(h) of the Act and on forms supplied by the Board for such purpose. The last such filing was on or about October 26, 1954 of affidavits of the officers duly executed on or about October 19, 1954 or October 22, 1954. After each such filing, with the exeption of the last, the Board notified the plaintiff

that it was in compliance with Section 9(h) of the Act and would be considered in compliance therewith for a year after the earliest of the affidavits filed provided there would be no intervening changes in plaintiff's officers. As a result of the last filing, plaintiff is now in compliance with Section 9(h) of the Act and is entitled to receive the benefits of the Act. And by virtue of the aforesaid filings, plaintiff has been in compliance with Section 9(h) of the Act, and entitled to receive the Act's benefits, since in or about August 1949, with the execption of lapses of a few days between the election of new officers and their filing of 9(h) affidavits.

6. Among the affidavits which plaintiff filed as aforesaid were affidavits of its secretary-treasurer, Maurice E. Travis, executed on or about August 4, 1949, December 20, 1949, December 12, 1950, November 8, 1951, December 19, 1951, December 3, 1952, November 6, 1953, and October 19, 1954.

7. On or about February 4, 1954, the defendants, acting as the Board, issued an order directing that an "administrative investigation and hearing" be held to determine whether the affidavits executed by Travis between August 1949 and November 1953, both inclusive, should be rejected and whether the Board should determine that the plaintiff is not now, and has not been, in compliance with the filing requirements of Section 9(h) of the Act.

8. In accordance with said order of February 14, 1954, an administrative hearing was held before an agent of the Board. On February 1, 1955, the defendants entered a Determination and Order, wherein (a) they found that the Travis affidavits executed between August 1949 and November 1953, inclusive, were false to the knowledge of the plaintiff's membership; (b) they determined that by virtue thereof the plaintiff is not, and has not been, in compliance with the filing requirements of Section 9(h) of the

Act; and (c) they ordered that no further benefits under the Act be accorded to the plaintiff or to any of its affiliate or consitituent units, "until the Union has complied with the filing requirements of Section 9(h) of the Act", meaning, by the last clause, that the Board will not accept for the purposes of compliance with Section 9(h) of the Act any affidavit executed by Travis.

9. The Board's Determination and Order of February 1, 1955, is illegal in the following respects, among others:

(a) It is in excess of the Board's power and jurisdiction and violates the Act and the Constitution.

(b) It violates due process of law, the Administrative Procedure Act, and the Act, in that it invalidates and makes ineffective the affidavit executed by Travis on or about October 19, 1954, and all future affidavits executed by him and this without any hearing having been held with respect to said affidavit or future affidavits.

(c) It is unsupported by substantial evidence or indeed by and evidence.

(d) It is arbitrary and capricious.

(e) It violates due process of law and the Administrative Procedure Act in that it finds that the plaintiff's members were aware that the Travis affidavits were false although in the administrative hearing the plaintiff was deprived of the opportunity to offer relevant evidence to the contrary.

10. The aforesaid Determination and Order of the Board causes, and unless enjoined will continue to cause, irreparable injury to the plaintiff.

(a) It invalidates all pre-existing certifications of the plaintiff, and thus causes it to lose its status as the exclusive collective bargaining agent for employees.

(b) It prevents the plaintiff from participating in
29 future elections to determine collective bargaining

representatives in proceedings now pending before the Board and which may hereafter be instituted. Thereby plaintiff will lose its status as the exclusive representative of the employees in various mines and plants. Furthermore, rival unions may acquire such a status even though the majority of the employees, if allowed a free choice, would select the plaintiff as their representative.

(c) It excludes the plaintiff from the benefits of the Act prohibiting unfair labor practice by employers.

(d) It prevents the plaintiff from entering into or renewing union-shop contracts and impairs the enforceability of union-shop provisions in existing contracts between plaintiff and various employers.

11. Plaintiff has exhausted its administrative remedy. It has no adequate remedy at law.

WHEREFORE, plaintiff demands judgment (1) declaring illegal, null and void the Board's aforesaid Determination and Order of February 1, 1955; (2) enjoining the defendants, their officers, agents, servants, employees, attorneys, and successors in office, and all persons in active concert of participation with them, (a) from keeping in effect the Board's aforesaid Determination and Order; (b) from keeping in effect any actions based on the aforesaid Determination and Order; (c) from suspending, restricting, revoking or threatening to revoke, plaintiff's status of compliance with section 9(h) of the Act; (d) from denying the plaintiff any of the benefits of the Act or access to the Board's processes by virtue of or on the basis of said Determination and Order; (e) from refusing, by virtue of or on the basis of said Determination and Order, to conduct elections, issue certifications, or process charges of unfair labor practices; and (f) from otherwise taking or refusing to take any action on account of or pursuant to said Determination and Order; and (3) granting such other and further relief as may be just and proper.

Plaintiff also requests a preliminary injunction enjoining the defendants, etc., as aforesaid, pending disposition of this cause, and an appropriate temporary restraining order.

NATHAN WITT
9 E. 40th St.
New York, N. Y.

JOSEPH FORER
711 Fourteenth St. N. W.
Washington, D. C.
Attorneys for Plaintiff

* * * * * * * * * * *

31 Filed Feb. 11, 1955

Motion for Preliminary Injunction

The plaintiff, International Union of Mine, Mill and Smelter Workers, by its attorneys, moves for a preliminary injunction enjoining, pending the final disposition of this action, the defendants, their officers, agents, servants, employees, attorneys, and successors in office, and all persons in active concert or participation with them, from keeping in effect the Determination and Order of the National Labor Relations Board, dated February 1, 1955 and referred to in the complaint; from keeping in effect any actions based on the aforesaid Determination and Order; from suspending, restricting, revoking or threatening to revoke, plaintiff's status of compliance with section 9(h) of the National Labor Relations Act, as amended; from denying the plaintiff any of the benefits of the Act or access to the Board's processes by virtue of or on the basis of said Determination and Order; from refusing, by virtue of or on the basis of said Determination and Order, to conduct elections, issue certifications, or process charges of unfair labor practices; and from otherwise taking or

refusing to take any action on account of or pursuant to said Determination and Order.

32 The grounds for this motion are that unless so enjoined the defendants will continue to perform the acts referred to in the complaint and will thereby cause the plaintiff immediate irreparable injury.

In support of this motion plaintiff refers to the supporting affidavit of Nathan Witt and to the record of the administrative proceeding before the National Labor Relations Board.

NATHAN WITT
DAVID REIN
JOSEPH FORER
Attorneys for Plaintiff

33. Filed Feb. 11, 1955

Affidavit in Support of Motions for Preliminary Injunction and Temporary Restraining Order

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss:

Nathan Witt, being duly sworn, deposes and says:

1. I am the General Counsel of the International Union of Mine, Mill and Smelter Workers, the plaintiff in this case, and have been such for approximately the last 13 years. I represented the plaintiff in the administrative hearing before the National Labor Relations Board, referred to in the complaint.

2. On information and belief, derived from my connection with the plaintiff and acquaintance with its affairs, the allegations of paragraph 2 of the complaint (describing the plaintiff) and of paragraphs 5 and 6 (relating to

the plaintiff's filing of 9(h) affidavits) are true and correct.

3. The allegations of paragraphs 7 and 8 of the complaint, relating to the administrative hearing before the the National Labor Relations Board and to the
34 Determination and Order of the Board, are true and correct.

4. The Determination and Order of the Board is causing and will continue to cause the plaintiff irreparable injury before this case can be disposed of on its merits and before disposition of the motion for preliminary injunction.

5. In *Precision Scientific Co.*, Case No. 13-CA-1441, the Board, on February 7, 1955, dismissed a complaint against the Company, brought upon plaintiff's charge of a refusal to bargain "* * * with considering the merits of the Trial Examiner's findings, conclusions and recommendations." and solely because of its Determination and Order of February 1, 1955.

6. In *Etiwan Fertilizer Co.*, 11-CA-738, the Trial Examiner's Report sustaining the allegations of a complaint based upon plaintiff's charge of discriminatory discharge by the Company is pending before the Board.

7 There is also awaiting decision by the Board of a complaint filed on charges brought by plaintiff in Phelps Dodge Corporation, Copper Queen Branch, Case No. 21-RC-3708.

8. The Board has taken the following action injurious to plaintiff in the following representation cases to determine bargaining representatives:

a) American Platinum Works—Case No. 2-RC-7089 where plaintiff has been dropped from the ballot in an election scheduled for February 14, 1955.

b) Nassau Smelting & Refining Co., 2-RC-7104 where the Board has issued a Decision and Direction of Election excluding plaintiff from the ballot.

35 9. There is pending before the Board Phelps Dodge Copper Products, Case No. 21-RC-3736 where objections to an election won by plaintiff have been filed by a rival union and R. H. Oshring Manufacturing Co., Case No. 21-RC-2262, Case No. 21-RC-3824 where plaintiff intervened in a representation proceeding.

10. On February 4, 1955, the Union filed with the Board a motion to amend the Determination and Order of February 1, 1955 requesting an administrative stay of the application of such order. Said motion was denied by the Board on February 7, 1955.

11. Unless a temporary restraining order is issued pending the hearing and determination of the motion for a temporary injunction, immediate irreparable injury will result to plaintiff.

NATHAN WITT

Sworn to before me this 10th day of February, 1955.

RALPH SHAPIRO
Notary Public, State of New York
No. 41-8940000 Qualified in Queens County
Cert. Filed in New York County
Commission Expires March 30, 1956

36 Filed Feb. 11, 1955

Findings, Conclusions and Order

This cause come on to be heard on plaintiff's application for a temporary restraining order and its motion for a preliminary injunction, and on defendants' opposition

thereto. After hearing the parties and examining the complaint and the other papers filed therein, it appears to the Court that:

1. This suit seeks to obtain review of and set aside administrative determination and order of the National Labor Relations Board, issued on February 1, 1955, finding that plaintiff union has not in fact complied with the requirements of Section 9(h) of the National Labor Relations Act and, therefore, is not entitled to benefits thereunder.

2. The principal irreparable injury alleged by plaintiff as necessitating a stay of the Board's determination and order is its denial to plaintiff of a place on the ballot in an election scheduled to be conducted by the Board on February 14, 1955, among the employees of the American Platinum Works, Case No. 2-RC-7089.

On the basis of the foregoing the Court hereby concludes that:

1. It is doubtful whether the Court has jurisdiction of the subject matter of the action.

2. In any event, there is no showing of such irreparable injury as would warrant the interim injunctive relief requested. This is particlarly clear in the light of the fact that the election in the American Platinum case or any other action taken therein could be set aside were this Court ultimately to decide that the Board's administrative determination of plaintiff's noncompliance were erroneous.

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ORDER

WHEREFORE, it is by the Court ordered that:

1. Plaintiff's application for a temporary restraining order and its motion for a preliminary injunction be and they are hereby denied.

2. The hearing on plaintiff's request for a permanent injunction be and it is hereby advanced to February 21, 1955.

Signed this eleventh day of February, 1955.

JAMES R. KIRKLAND
United States District Judge

* * * * * * * * * *

43 (Filed Feb. 16, 1955)

Motion to Intervene as a Defendant

And now comes Precision Scientific Company, an Illinois Corporation by Barnabas F. Sears and James M. Barnes, its attorneys, and moves the court for leave to intervene as a defendant herein pursuant to Rule 24 of the Federal Rules of Civil Procedure on the following grounds:—

1. That the representation of applicant's interest by existing parties is inadequate and applicant is or may be bound by a judgment in the action in that existing parties do not question:

(a) Whether plaintiff is a labor organization within the meaning of section 2(5) of the Taft-Hartley Act;

(b) Whether each of the officers of plaintiff duly complied with section 9(h) of said Act by filing affidavits, the contents of which were true to their own knowledge and belief;

(c) The right of a Communist dominated organization, masquerading as a labor union, to invoke the processes of a court of equity to protect rights procured by fraud and deceit;

(d) The matters of grave public interest affecting the internal security of this Nation thereby involved;

(e) The question of whether plaintiff is in this court with clean hands;

all as more particularly set forth in applicant's proposed answer hereto attached.

2. Applicant's defense and the main action have a question of law and fact in common, namely:

(a) Whether plaintiff is a labor organization in fact or in law;

44 (b) Whether plaintiff has duly complied with section 9(h) of the Taft-Hartley Act;

(c) Whether plaintiff procured rights under said Act by fraud, perjury and deceit;

(d) Whether a Communist dominated organization masquerading as a labor union, is in law or in fact a labor organization;

(e) Whether, in view of the grave public interest affecting the internal security of this Nation thereby involved, this Court should afford its process in aid of such organization and thereby protect rights procured by fraud, perjury and deceit, and;

(f) Whether plaintiff is in this Court with clean hands; all as more particularly set forth in applicant's proposed answer hereto attached.

3. Applicant is an Illinois Corporation. Plaintiff claims bargaining rights under the Taft-Hartley Act (29 U.S.C.A. 141 *et seq.*) in applicant's plant in Chicago, Illinois, pursuant to a certification of the National Labor Relations Board dated April 10th, 1953, in case no. 13-R.C.-3091. This certification resulted from an election held pursuant to a petition for certification filed by Local 1031, International Brotherhood of Electrical Workers (A.F.L.). Plaintiff procured leave to intervene in the hearing held on said petition over the objections of said Local 1031 and applicant. Thereafter, applicant refused to bargain with plaintiff and said Board issued a complaint against applicant in cause number 13-CA-1441, charging its refusal to bargain with said plaintiff and plaintiff's constituent, Local 758, in violation of section 8(a)5 of said Act (29 U.S.C.A. 158). Applicant's answer to said complaint denied the charge and affirmatively averred that plaintiff was not a labor organization under section 2(5) of said Act (29 U.S.C.A. 152),

but on the contrary was a Communist dominated organization, that its officers were members of the Communist Party and that plaintiff had not complied with section 9(h) of said Act (29 U.S.C.A. 159) in that the affidavits required to be filed by its officers pursuant to said section were false.

4. The Trial Examiner of said Board denied applicant the right to prove said facts in the hearing based upon the complaint although applicant made detailed and exhaustive offers to prove said facts. Said Trial Examiner filed an Intermediate Report finding applicant guilty of a refusal to bargain, applicant filed exceptions to said Intermediate Report and applicant, plaintiff and General Counsel for the Board filed briefs before the Board.

5. Thereafter, on February 4, 1954, upon the basis of evidence offered by applicant in said cause number 13-GA-1441, the said Board entered an order for the administrative investigation and hearing and made and entered the Determination and Order of February 1, 1955, set forth in paragraphs 7 and 8 of the complaint herein. Thereafter, on the basis of its February 1, 1955 order, said Board on February 7, 1955 made a decision and order dismissing the complaint in said cause number 13-GA-1441, copies of both orders being attached to and incorporated in applicant's proposed answer.

6. The complaint herein seeks to have declared invalid the Board's Determination and Order of February 1, 1955 and to enjoin the enforcement thereof. Rights accruing to applicant under the Board's decision and order of February 7, 1955 stem from said Determination and Order of February 1, 1955. Applicant might or could become bound by a judgment herein insofar as its rights under the order of February 7, 1955 are concerned should plaintiff procure a favorable judgment herein and by virtue of it procure a reversal of said order of February 7, 1955 pursuant to a petition filed under Section 10(f) of Taft-Hartley (29

U.S.C.A. 160 f) or otherwise and should said Board thereafter deny applicant the right to prove the defense it asserted in said cause number 13-CA-1441. Said Board has heretofore held that an employer cannot contest the truth or falsity of 9(h) affidavits in an unfair labor practice proceeding.

7. Existing defendants have filed a motion for a summary judgment. Said motion, by not denying, admits, *inter alia*, the following allegations of the complaint:

(a) Plaintiff is a "labor organization" (Complaint par. 2) and

(b) That "Plaintiff duly filed with the Board the affidavits of all of its officers, duly executed in accordance with Section 9(h) of the Act" (Complaint par. 5)

Applicant avers that its interest is most inadequately represented by this frame of reference as applicant avers in its proposed answer that plaintiff is not in law or in fact
a labor organization but an arm of the Communist
46 Party (Answer par. 2) and its officers are now and have been for more than five years immediately last past, members of said Party and have during said period filed false affidavits under Section 9(h) of said Act.

8. Applicant therefore moves for leave to intervene *instanter* and for leave to file *instanter* an answer, copy of which is hereto attached.

9. Applicant desires to argue this motion orally.

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JAMES M. BARNES
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Attorneys for Applicant

Exhibit A

47 (Filed Feb. 16, 1955)

REPORT FROM SUBCOMMITTEE INVESTIGATING COMMUNIST DOMINATION OF UNION OFFICIALS IN VITAL DEFENSE INDUSTRY—INTERNATIONAL UNION OF MINE, MILL, AND SMELTER WORKERS

Hearings were held in Salt Lake City, Utah, on October 6, 7, 8 and 9, 1952 respecting the Communist affiliation of the principal officers of the International Union of Mine, Mill, and Smelter Workers, a union which has organized approximately 100,000 Workers in the non-ferrous-metal mining and allied industries.

The testimony taken at Salt Lake City is transmitted herewith, and its principal points are as follows:

(1) The International Union of Mine, Mill, and Smelter Workers was in 1950 expelled from the Congress of Industrial Organizations because the policies of the union were "consistently directed toward the achievement of the program and the purposes of the Communist Party rather than the objectives and policies set forth in the CIO constitution."

Mr. Stanley H. Ruttenberg, director of education and research, Congress of Industrial Organization, testified that the International Union of Mine, Mill, and Smelter Workers "was led and dominated by those individuals who are sympathetic to the position of the Communist Party."

(2) The two principal officers of the International Union of Mine, Mill and Smelter Workers and John Clark, president, and Maurice Travis, the secretary-treasurer. Testimony was received to the effect that Maurice Travis is the dominating figure in this union although he is surrounded by lesser officials, some of whom were called as witnesses, and refused to answer questions concerning their Communist Party membership, affiliations, or activities.

(3) A former official of the International Union of Mine, Mill, and Smelter Workers, Kenneth Eckert, testified with respect to the Communist Party membership of Maurice Travis and other union officials. In addition, other testimony was taken concerning the Communist Party membership of Travis and other union officers.

48 Mr. Eckert furnished, in his testimony, instances in which the Communist Party fraction of the union made and dictated policies which later emerged as union policy:

Question. So that then a small number of Communists, even four, even the steering committee, could commit a union of 100,000 members to a program which they, the four Communists, or a few more Communists, originated.

Mr. Eckert. It not only could but did, and does, obviously.

* * * * * * * * * * *

Question. Then, irrespective of the various channels through which this program went, it started with the Communist Party and crystallized as doctrine for a program of the union as whole; is that right?

Mr. Eckert. That is correct.

* * * * * * * * * * *

Question. Then you had, as the end result, the convention adopting a program which originated with a small number of people who were Communist Party members and was later adopted as the program of over 100,000 members; is that essentially correct?

Mr. Eckert. That is correct.

* * * * * * * * * * *

Mr. Eckert and other witnesses testified to the effect that the overwhelming majority of the members of the International Union of Mine, Mill, and Smelter Workers were not Communists. Mr. Eckert estimated that the actual Communist Party membership in the union never averaged even 1 percent of the total union membership.

(4) Mr. Eckert testified that he had known Maurice Travis as a member of the Communist Party:

Question. Do you know Maurice Travis?

Mr. Eckert. Yes.

Question. Do you know Maurice Travis as a member of the Communist Party?

Mr. Eckert. Yes.

Question. Have you attended Communist Party meetings with Maurice Travis?

Mr. Eckert. I have attended many party meetings with Maurice Travis.

The statements of Maurice Travis when a witness before the subcommittee offer an abrupt contrast:

49 Question. Are you, at the present time, a member of the Communist Party?

Mr. Travis. I refuse to answer that question on the same grounds.

On August 15, 1949, the organ of the International Union of Mine, Mill, and Smelter Workers, which was called the Union, printed on page 3 an article bearing the byline of Maurice Travis. This article, in substance, was an apology by Travis for resigning from the Communist Party in order to comply with the non-Communist-affidavit provisions of the Labor Management Relations Act of 1947. Mr. Travis was interrogated concerning this article, after he refused to acknowledge that he had written it, or that he had it prepared for his signature, as follows:

Question. I quote you the following paragraph from this article to which we have been alluding: "Membership in the Communist Party has always meant to me, as a member and officer of the international union, that I could be a better trade-unionist."

Will you kindly explain to the subcommittee why it is possible for you to be a better trade-unionist as a Communist than as a non-Communist.

Mr. Travis. I refuse to answer that question on the same grounds.

* * * * * * * * * *

Question. I quote the following sentence from the same article: "The biggest lie of all is to say that the Communist Party teaches or advocates the overthrow of the Government by force and violence." Are those your present sentiments, and do you now believe that the Communist Party, U.S.A., does not conspire to overthrow this Government by force and violence?

Mr. Travis. I refuse to answer that question on the same grounds.

* * * * * * * * * * *

Question. I quote you the following sentence from the same article: "I believe under our Bill of Rights, for which our forefathers fought, that an American has as much right to be a Communist as he has to be a Republican, a Democrat, a Jew, a Catholic, or a Mason.". Is it still your opinion that a citizen of this Nation has as much right to be a Communist as he has to be a Republican, a Democrat, a Jew, a Catholic, or a Mason?

Mr. Travis. I refuse to answer that question on the same grounds, and I might say that I am going to refuse to answer any questions about this alleged statement, on the same grounds, if it will save time.

50 Travis also refused to acknowledge execution of two affidavits in compliance with the non-Communist provisions of the Labor Management Relations Act of 1947, even after photostatic copies of these affidavits were laid before him. He also declined to answer a long series of questions dealing with his Communist Party activities from the early 1940's forward, and would not acknowledge a letter bearing his name which he had addressed to William Schneiderman, which letter is reproduced in the body of the testimony.

Mr. Eckert testified with respect to John Clark as follows:

Question. Do you know John Clark as a person who has collaborated with known members of the Communist Party

to further the airs of these known members of the Communist Party?

Mr. Eckert. Yes.

* * * * * * * * * * *

Mr. Eckert. Well, in my opinion, the president of the union, John Clark, is for all purposes a Communist, who follows the Communist Party line. * * * I know that it would be impossible for John Clark to break away from the Communist and Mine, Mill, and Smelter Workers without them doing the kind of hatchet job on him of character assassination that they have done on every individual who has exercised his right to break his affiliations with the Communists in that union and other unions.

John Clark, present president of the International Union of Mine, Mill, and Smelter Workers, followed the same pattern as did Travis in his refusal to answer questions concerning his Communist Party background.

Question. Are you now a member of the Communist Party, Mr. Clark?

Mr. Clark. (confers with counsel). I am going to claim the privilege under the law that it gives me the right not to answer that question.

* * * * * * * * * * *

Question. Have you attended some Communist Party meetings with Mr. Travis?

Mr. Clark. I again take refuge under law, the fifth amendment, and refuse to answer that question.

Mr. Clark also refused to acknowledge photostatic copies of affidavits of non-Communist membership which he had filed with the National Labor Relations Board, when those copies were laid before him.

51 The chairman of the subcommittee asked Mr. Clark the following question:

Question. Does your organization collaborate with the Communist Party on labor matters?

Mr. Clark. I would like to take the privilege under that type of question, Mr. Chairman.

Mr. Clark testified that it would be his duty to report to the membership of the union any individual who was in the pay of an employer and reporting back to that employer on union activities. He also testified that it would be his duty to notify the union if a member of the union were in the pay of the Congress of Industrial Organizations and reporting back to the Congress of Industrial Organizations on activities of the International Union of Mine, Mill, and Smelter Workers. However, Mr. Clark declined to say that it would be his duty to warn the union of a member who was, as a member of the Communist Party, reporting to the Communist Party on union activities.

(5) Other former officers and officials of the International Union of Mine, Mill, and Smelter Workers testified with respect to the Communist Party infiltration into and control of the union.

Mr. Homer Wilson, a former vice president of the Union, testified that the Communist Party actually dominated and made the decisions for the International Union of Mine, Mill, and Smelter Workers. Ralph Rasmussen, a former member of the executive board of the union, cited numerous conversations he had with other union officials who were then members of the Communist Party. Mr. Rasmussen also testified that he was solicited to join the Communist Party by a union official.

(6) A former member of the Communist Party, Mr. Harvey Matusow, testified that while he was in attendance at the San Cristobal Valley Ranch in New Mexico he was told by an international representative of the International Union Mine, Mill, and Smelter Workers that Communist elements in the union sought to give aid and comfort to the Communist forces facing United States troops in Korea by an attempt to curtail copper production in this country. The individual with whom Mr. Matusow had the conversation was one Clinton Jencks, also a witness. Mr. Jencks declined to answer questions concerning his Communist Party affiliation but did admit

that he had been a member of the union only 6 months before he was a paid union official. Jencks refused to comment on the testimony of Mr. Matusow and would not admit having met Mr. Matusow.

(7) Another union official identified as a Communist by Mr. Eckert was Graham Dolan. Mr. Dolan indicated that he worked on special assignments for four international officials of the union, including John Clark and Maurice Travis. Dolan, who has never worked in an industry organized by the International Union of Mine, Mill, and Smelter Workers, declined to answer questions concerning his Communist Party affiliation. The theme of Dolan's testimony is accurately reflected in the following exchange:

Question. Do you think the Soviet Union has a right to maintain espionage apparatuses within this country?

(Mr. Dolan confers with counsel.)

Mr. Dolan. I would like to claim the privilege of the fifth amendment on that question, sir.

Question. Do you resent the fact that the Soviet Union has or does maintain espionage apparatuses within the United States?

Mr. Dolan. I decline to answer that question on the grounds of the privilege afforded me by the fifth amendment.

(8) Other union officials who refused to answer questions concerning Communist Party affiliations were Herman Glott, Washington representative; Orville Larson, international vice president; Albert Skinner, international representative, Roderick Holmgren, assistant editor of the union organ; Rudolph W. Hanson, international representative; Nathan Witt, counsel; and Jack Blackwell, union member.

53 COMMENTS AND RECOMMENDATIONS

It should be a matter of deep and continuing concern to all patriotic citizens that the International Union of Mine, Mill and Smelter Workers, which operates in an industry

so vital to the security of their Nation, is controlled by officers who have been identified under oath as Communists, and will not deny their membership in the Communist Party.

The testimony is clear that the overwhelming majority of this union is not Communist, and the subcommittee expresses the hope that the rank and file of this membership will forthwith rid itself of its present leadership.

The subcommittee recommends that attention be given to perfecting legislation similar to the bill (S. 2548) of the Eighty-second Congress introduced by Senator Pat McCarran, Democrat, Nevada. This legislation should preclude a member of a Communist organization from holding office in or being employed by any labor organization. It should also permit the discharge by employers of persons who are members of organizations designated as subversive by the Attorney General of the United States.

The subcommittee also recommends that a copy of these proceedings be transmitted to the Attorney General for his consideration in conjunction with prosecution for perjury in connection with the signing of non-Communist affidavits required by the Labor Management Relations Act of 1947 by those officers named as Communists by witnesses before the subcommittee.

PAT MCCARRAN, *Chairman*,
JAMES O. EASTLAND,
ARTHUR V. WATKINS.

54 (Filed Feb. 16, 1955)

Exhibit B

DETERMINATION AND ORDER

On February 4, 1954, the Board issued an order directing an administrative investigation and hearing in the above-entitled proceeding. This hearing was directed upon allegations made by Precision Scientific Company, Respondent in a pending complaint case (13-CA-1441), that the

International Union of Mine, Mill and Smelter Workers (Independent), herein called the Union,[1] is not and never has been in compliance with the filing requirements of Section 9 (h) of the Act.[2] In support of these allegations, Precision Scientific Company, herein called the Company, had offered to prove in the complaint case that the non-Communist affidavits filed by the Union's secretary-treasurer, Maurice E. Travis, were false, as demonstrated by a published statement in which he announced to the Union members that he resigned from the Communist Party to make it possible for him to execute the affidavits, but that he nevertheless continued to believe in the principles of Communism and the Communist Party.

The Board's order directed a hearing on whether Travis has admitted the falsity of his non-Communist affidavits, and whether the Union membership was aware that the affidavits were false.[3] The order further stated that if these allegations were true, a determination that the Union has not been, and is not, in compliance would be required.

55 The hearing was held before Hearing Officer George A. Downing on May 10-11 and 18-20, June 4, and July 7-8 and 14. The Union and Travis, herein called Respondents, and the General Counsel appeared at the hearing and were afforded full opportunity to be heard, to examine and cross-examine witnesses, to adduce evidence bearing on the issues, and to give oral argument. The Company also appeared as *amicus curiae* and was permitted to give oral argument.

On September 10, 1954, the Hearing Officer issued his Report of Hearing Officer, attached hereto, finding, *inter alia*: (1) that Travis, while secretary-treasurer of the Union, made a published statement in 1949 to the Union members that he had resigned from the Communist Party to make it possible for him to execute the non-Communist

1 The Union is the parent organization of the charging Local in that case.

2 Precision Scientific Company asserted the Union's lack of compliance in defense to the Section 8 (a) (5) charge.

3 See Coca-Cola Bottling Company of Louisville, Inc., 108 NLRB No. 81 at page 3.

affidavit but that he nevertheless continued to believe in the principles of Communism and the Communist Party; (2) that Travis' statement disclosed on its face his admission of the falsity of his non-Communist, affidavit; and (3) that the membership of the Union was aware of the falsity of Travis' 1949 and subsequent affidavits, yet continued to reelect him. Thereafter, Respondents filed exceptions to the Report of Hearing Officer and a supporting brief, and the Company and General Counsel filed briefs in support of the Report.

Respondents also filed, on October 4, 1954, a motion for an order directing the Hearing Officer to withdraw the Report and to conduct a further hearing, or in the alternative, for oral argument on the motion. The Company and General Counsel filed opposing briefs, and Respondents filed a reply brief.[4]

The Board has reviewed the rulings of the Hearing Officer made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed.

The Board has considered the Report of Hearing
56 Officer, the exceptions and briefs, and the entire record in the proceeding, and hereby adopts the findings and conclusions of the Hearing Officer to the extent consistent with the following:

1. We agree with the Hearing Officer that Travis made the statement printed as an article[5] in the August 15, 1949, issue of *The Union*, the official newspaper of the Respondent Union. We also agree that the newspaper article disclosed on its face Travis' admission of the falsity of his August 4, 1949, non-Communist affidavit,[6] and with the Hearing Officer's reasoning that the meaning of the article may

[4] Regarding the alternative request for oral argument, it is denied, as the motion, briefs, and the record adequately present the issues and the positions of the parties. We also find the primary bases for the motion to be without merit, for the reasons stated below, and therefore deny the motion in its entirety.

[5] The article appears as Appendix B to the Report of Hearing Officer.

[6] We do not, in any way, rely in this proceeding on the General Counsel's theory of Aesopian language.

be considered in the light of the undisputed evidence of Travis' long-established position as a member of the Communist Party, as one of its leaders within the Union, and such other facts, detailed by the Hearing Officer, as were contemporaneously of general common knowledge concerning the nature and goals of Communism. We further rely on the uncontradicted evidence that this article had been prepared and cleared with "the Party people" at the Comunist Party headquarters in New York prior to the execution and submission by Travis of his affidavit.

Moreover, apart from all other evidence in the record, we find that the 1949 article, when read literally, conclusively established Travis' admission of the falsity of his initial non-Communist affidavit. The affidavit, which Travis filed for the purpose of qualifying the Union to participate in the Board's processes, read in part:

"2. I am not a member of the Communist Party or affiliated with such party.

"3. I do not *believe* in, and I am not a member of *nor do I support any organization that believes in or teaches,*[7] the overthrow of the United States Government by force or by any illegal or unconstitutional method." (Emphasis added.)

57 As we have found, Travis published the Union newspaper article shortly after filing this affidavit. The article, considered as a whole, makes clear that he was patently admitting the falsity of the parts of the affidavit in which he disavowed *belief* in the forceful overthrow of the Government, and *support* of the Communist Party, an organization that believes in and teaches such forceful overthrow of the Government. Not only is the article wholly barren of any statement or expression indicating conscious abandonment of previously held Communist beliefs, but on the contrary it represents a sincerely and briefly articulated panegyric to what Travis believed

[7] We take judicial notice, through the cases cited in the Report of Hearing Officer, that the Communist Party is such an organization.

to be the meaning of Communism and the role of a Communist adherent within the labor movement. It would stretch credulity beyond undertsanding were we required to assume that Travis had abandoned his Communist beliefs or his support of the Communist Party when he asseverates in the article "that good Communists are good trade unionists" working against the "rotten . . . foundation of the capitalistic system," and that "despite my resignation from the Communist Party, I will continue to fight for these goals with all the energy and sincerity at my command." Indeed, Travis refers in the article to "my belief in Communism." This reference, in itself, conclusively established Travis' admission of continued belief in the forceful overthrow of the Government; and the mere making and publication of the article, in and of itself constituted an admission of his support of the Communist Party.

2. As to Travis' subsequent non-Communist affidavits, we agree with the Hearing Officer that the undisputed evidence detailed in the Report of Hearing Officer, established that Travis has not altered his allegiance to or support of the Communist Party, nor his belief in the overthrow by force and violence of this Government. The Respondent failed to rebut this evidence in any respect. Indeed, it even failed to call Travis as a wit-
58 ness.[8] Such conduct supports, indeed, impels, the inference, which we hereby make, that Travis has retained his belief in Communism, and has continued to support the Communist Party while remaining an officer of the Union.

3. We also agree with the Hearing Officer's finding that the Union membership was aware of the falsity of *all* of Travis' affidavits. This finding of awareness on the part of the Union's membership is clearly established by evidence of the publication, in the Union's official news-

[8] Travis even refused to honor a subpoena to appear as a witness in this proceeding served upon him by the General Counsel.

paper, of Travis' 1949 article in which he admitted the falsity of his initial affidavit, and the distribution of that newspaper to all the Union members; the fact of general awareness in this country of the true nature, aims, and methods of Communism and the Communist Party; and the evidence, detailed in the Report of Hearing Officer, that the members of the Union were better equipped than the general public properly to evaluate Travis' 1949 newspaper article and his subsequent Communist activities.[9]

Moreover, as we have found that Travis' 1949 article conclusively established on its face his admission of the falsity of his initial non-Communist affidavit, we especially find that apart from all other evidence in the record, the mere publication and distribution of the newspaper article established awareness on the part of the Union membership of the falsity of that affidavit. Despite this awareness, the Union members did not relieve Travis of his official position as an officer, but on the contrary, retained him in that position and repeatedly thereafter reelected him. Accordingly, we further find that by retaining him in office after that admission, and thereafter by continuing to reelect his as an officer, with knowledge that his affidavits were a fradulent means of qualifying the Union for participation in the processes of the Board, the
59 Union membership has permitted their Union to be used by one whose admitted sympathies and actions have been found to be dedicated to the principles of Communism and completely inimicable to our national security. By thus permitting the fraudulent procurement of the Board's letters of compliance, in abuse of its processes, they have sanctioned a complete negation of the Congressional purpose which is inherent in the affidavit filing requirements of Section 9 (b) of the Act.

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[9] Examples of such evidence are the CIO's investigation of Communist domination of the Union and its final expulsion of the Union from the CIO in 1950; the revolt of scores of locals from the Union over the Communist issue; the Senate Sub-Committee (Judicial Committee) investigation in 1952 of Communist affiliation of Travis and other Union leaders, and Travis' refusal at the Sub-Committee hearing in Salt Lake City to testify regarding his non-Communist affidavits; and the resulting publicity to Union members.

4. In its October 4, 1954, motion for a remand, the Respondents seek a further hearing "so that respondents may have an opportunity to offer testimony of members of [the Union]." In support of this motion, they cited the refsual of the Hearing Officer to grant certain other motions, made at the hearing, to recess the hearing to various cities throughout the country for the purpose of calling as witnesses large numbers of Union members on the question of their awareness of the falsity of Travis' affidavits. Respondents, in their October 4 motion, thereby appear to be renewing these earlier motions, although they do not specifically so state.

As a further basis for the motion, they contend that the Hearing Officer's June 7, 1954 interlocutory order "stated that if awareness were based on the actual text of the Travis statement, it would be necessary to take evidence only on its publication in *The Union* and the distribution thereof to the members," whereas in his report, the Hearing Officer's "conclusion of membership awareness . . . does not rest on the language of the Travis statement alone, but on . . . many . . . matters extraneous to the text of the Travis statement." They assert that they have been denied a hearing on these extraneous matters, in violation of Section 7 of the Administrative Procedure Act, 5 U.S.C., 1006, and the due process clause of the Fifth Amendment to the Constitution.

We find no merit in this motion, nor in these assertions. At no time have Respondents demonstrated any basis to justify further hearing, much less that the hearing should be held in different places. Respondents have not supported any of their motions by an indication that
60 they definitely have witneses available to testify on the issues, nor by disclosure of any evidence that otherwise might be offered. Indeed, Respondents' counsel admitted, with reference to Respondents' motions to recess the hearing to various cities for testimony by Union members, that "this is speculative because we haven't had

an opportunity to consider it and discuss it with our people." As of this date, Respondents have shown no further preparation. Furthermore, Respondents have not filed an affidavit alleging surprise or hardship, precluding the presentation of such testimony during the course of the hearing held in Washington, D. C.

Moreover, Respondents have had their "day in court" on the issue of membership awareness. In the order directing the hearing, the Board defined this issue as follows: "(2) whether the membership : . . was aware that such affidavits were false." In the June 7 interlocutory order, the Hearing Officer held that "if Travis' admission in fact appears on the face of the article, when read literally, the awareness of the membership will be established by the publication and distribution of the Article to the members." Despite this holding by the Hearing Officer, Respondents offered no evidence at the hearing to disprove such awareness. Therefore, in this respect, Respondents deliberately declined to offer evidence in their own behalf, despite the precise notice of the nature of the case they were called upon to meet. Under all the circumstances, they may not by this belated motion further delay these proceedings. The motion to remand is denied.

Respondents also contend that the June 7 interlocutory order held rebuttal evidence on awareness to be irrelevant. This holding by the Hearing Officer clearly applied only to the General Counsel's theory of Aesopian language. As indicated above, we have not and do not base any part of our findings or determinations on that portion of the General Counsel's case. Furthermore, Respondents did not rely on that holding as a basis for their own
61 determination not to put on evidence in defense during the hearing. Indeed, Respondents' counsel explained to the Hearing Officer:" . . . this position [we are taking in not producing evidence] is based on your order of June 7, in which you found that the General Counsel had failed to make a prima facie case on the sec-

ond basic issue, the issue of membership awareness." The June 7 order clearly demonstrates the contrary. The order specifically found a *prima facie* case of membership awareness if there were admissions by Travis of the falsity of his affidavit on the fact of his August 1949 article.

In any event, we are of the opinion that denials of awareness by some individual Union members could not rebut the conclusive evidence of awareness we have found from the publication and distribution of the article to the membership. Nothing probative would be added to the record even if individual Union members might be produced to testify (contrary to what an ordinary, reasonable person would conclude) that they did not so construe the article.[10] Accordingly,

IT IS ADMINISTRATIVELY DETERMINED that International Union of Mine, Mill and Smelter Workers, (Independent) is not, and has not been, in compliance with the filing requirements of Section 9 (h) of the Act.

62 IT IS THEREFORE ORDERED, in the interest of effectuating the policies and purposes of Section 9 (h) of the Act to serve the requirements of national security, and to protect the integrity of the Board's processes, that no further benefits under the Act be accorded to International Union of Mine, Mill and Smelter Worker (Independent), or to any of its affiliates or constituent units,

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[10] Respondents also make other procedural contentions: (a) They contend that they were denied due process of law by the Board's April 30, 1954, order denying Respondents; motion for a bill of particulars. However, the Hearing Officer thereafter permitted the General Counsel to introduce evidence to support his alternative theories of the case, and accorded Respondents every opportunity of cross-examination and rebuttal. Respondents have not established that they were prejudiced thereby. (b) They also contend that the recently enacted Communist Control Act of 1954 "would seem to preempt the field." In part this new law empowers the Subversive Activities Control Board to determine whether a labor organization is Communist-infiltrated, and provides that, upon such finding, the union shall be deprived of benefits under the National Labor Relations Act. This new law does not repeal Section 9 (h) of the Act, or otherwise lessen the Board's powers thereunder. (c) Respondents further contend that, "insofar as such denial [of a hearing] is based on the Hearing Officer's conclusions respecting the knowledge, beliefs, and opinions of the members of [the Union], such denial violates the First Amendment to the Constitution." As we find that Respondents were accorded a fair hearing, we accordingly overrule this contention.

until the Union has compiled with the filing requirements of Section 9 (h) of the Act.

Dated, Washington, D. C.

GUY FARMER, *Chairman*
ABE MURDOCK, *Member*
IVAR H. PETERSON *Member*
PHILIP RAY RODGERS *Member*
(SEAL) NATIONAL LABOR RELATIONS BOARD

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63 UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D. C.

Maurice E. Travis, Secretary-Treasurer International Union of Mine, Mill and Smelter Workers and Compliance Status of International Union of Mine Mill and Smelter Workers.

ERRATUM

At line 50, page 20, of the Hearing Officer's Report, the words Section D, are hereby corrected to read Section C.

Dated at Washington, D. C. this day of September 1954.

GEO. A. DOWNING
George A. Downing,
Hearing Officer.

64 UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D. C.

Maurice E. Travis, Secretary-Treasurer International Union of Mine, Mill and Smelter Workers and Compliance Status of International Union of Mine Mill and Smelter Workers.

Mr. James F. Foley, for the Board.

Messrs. Nathan Witt and Albert Pezzati, of New York City, and Herman Clott, of Washington, D. C., for Maurice E. Travis and the International Union.

Messrs. Barnabas F. Sears, of Chicago, and James M. Barnes, of Washington, D. C., for Precision Scientific Company, as Amicus Curiae.

Before: George A. Downing, Hearing Officer.

Report of Hearing Officer

On February 4, 1954, the Board issued its order in the above matter in which it directed that an administrative investigation be conducted to determine whether certain affidavits referred to therein, executed by Maurice E. Travis and filed with the National Labor Relations Act pursuant to Section 9 (h) of the National Labor Relations Act, as amended (61 Stat. 136, herein called the Act), should be rejected, whether the letters of compliance referred to therein, issued to the International Union of Mine, Mill and Smelter Workers (herein called the Union and Mine-Mill), should be revoked, and whether the Board should determine that the Union is not now, and has not during the period covered by said letters of compliance, been in compliance with the filing requirements of said Section 9 (h).

The Board's order recited that it was based on allegations by Precision Scientific Company (Respondent in Case No. 13-CA-1411 before the Board) that Travis' compliance affidavits were false for the reason, inter alia, that Travis had stated in an article published under date of August 15, 1949, in "The Union," a newspaper published by and distributed to the members of said Union, that he had resigned from the Communist Party to make it possible for him to execute an affidavit as aforesaid, but that he nevertheless continued to believe in the principles of Communism and the Communist Party. The Board stated its opinion was that those allegations, if true, would estab-

lish that Travis' affidavits were and are admittedly false, that the membership of the Union was and is aware of the falsity of the said affidavits, and that the processes of the Board have been and are thereby being abused.

The Board ordered that, as a part of its administrative investigation, a hearing should be held before a hearing officer of the Board, to be designated by the Chief Trial Examiner of the Board, for the purpose of receiving evidence pertaining to the issues (1) whether Maurice E. Travis has admitted that his said compliance affidavits were false (herein called Issue I), and (2) whether the membership of the International Union was aware that such affidavits were false (herein called Issue II.) The Board directed that said hearing be conducted, insofar as practicable, in accordance with its Regulations, Series 6, as amended, Sec. 102.34 et seq., and that the Hearing Officer issue and serve on the parties his report,
65 setting forth his findings of fact with respect to said Issue I and II, including findings as to credibility.

Pursuant to notice, and in conformity with the aforesaid Order a hearing was held in Washington, D. C., between May 10 and 20; and on June 4, July 7, 8, and 14, before the undersigned, George A. Downing, a Trial Examiner designated by the Chief Trial Examiner as the Hearing Officer to conduct the hearing. All parties appeared and were represented by counsel at the hearing. Counsel for Precision Scientific Company were permitted to appear and to participate as amicus curiae.

The parties were afforded full opportunity to be heard, to produce, examine, and cross-examine witnesses, to introduce evidence relevant to the issues specified in the Board's order, to argue orally, and to file briefs. Final argument was heard on July 14, and briefs have been filed by the parties and by counsel for Precision Scientific Company, as amicus curiae.

Many motions were made by the parties and were ruled on by the Hearing Officer during the course of the hearing; and review by the Board was sought on some of such rulings by requests for special permission to appeal, by motion to dismiss the investigation, etc. The Board denied all such requests and motions made to it. The only ruling which requires especial mention was contained in an interlocutory order entered by the Hearing Officer on June 7. The General Counsel having rested his case-in-chief on May 20 (with minor reservations), Respondents renewed their former motions—previously denied by the Board and by the Hearing Officer—to adjourn the hearing to various cities throughout the country, where there are heavy concentrations of Union membership, for the purpose of calling as witnesses large numbers of Union members on the question of their awareness of the falsity of Travis' affidavits.

Preliminary to ruling on said motion, and for the purpose of enabling him to determine whether such testimony was either necessary or relevant, the Hearing Officer heard argument on June 4 on the question whether the General Counsel's case had established prima facie the affirmative of Issues I and II. Thereupon, he issued his order of June 7, denying Respondent's motion to adjourn the hearing as aforesaid, and holding the proposed evidence to be irrelevant and unnecessary in the light of certain interim findings therein made, which may be summarized as follows:

(a) That if Travis' published statement contained on its face his admission of the falsity of his affidavits (a question on which ruling was reserved), then the General Counsel's evidence had established prima facie the awareness of the membership of such falsity.

(b) That to the extent that the General Counsel's case depended on certain "Aesopian" language testimony to establish Travis' admissions of falsity, the evidence did not establish membership awareness of such falsity.

Following refusal by the Board on June 29, to review the rulings and the interim findings made in said order,[1] the hearing was resumed on July 9, and was concluded on July 14, without Respondents having offered any evidence, save for certain exhibits, to refute that which the General Counsel had adduced.

Because of the latter fact, it is appropriate, before turning to a summary of the evidence, to point out that the case stands in substantially the same posture as it did when the General Counsel rested, i.e., without refutation by Respondents of the documentary evidence or denial of the testimony of the General Counsel's witnesses. Though Respondents strenuously attack the credibility of William Mason, Kenneth Eckert, and Manning Johnson, the first two, in particular, testified to many facts concerning conversations and other experiences with Travis, and to long standing personal knowledge of the Union's affairs, which Respondents were obviously in position to refute through the testimony of Travis and other witnesses. However, Travis not only failed to appear or to take the stand in his own behalf, but he also refused to respond to the General Counsel's subpoena.

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"All evidence", as Lord Mansfield said in Blatch v. Archer (Cowper, 63, 65), "is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other side to have contradicted." See Kirby v. Tallmadge, 160 U. S. 379, 383. Consequently, "The failure under the circumstances to call as witnesses those . . . who were in a position to know . . . is itself persuasive that their testimony, if given, would have been unfavorable. . ." Interstate Circuit, Inc., v. U. S., 306 U. S. 208, 226; cf. N. L. R. B. v. Ohio Calcium Co., 133 F. 2d 721, 727 (C. A. 7).

The failure thus to refute the Eckert-Mason testimony is strongly persuasive of its accuracy and credibility. Though

[1] Since frequent references will be made herein to the text of the order, a copy thereof has been attached for convenience as Appendix A.

Mason obviously had a poor recollection for dates and for details of conversations, and though cross-examination cast doubt on some details which he testified to (e.g., the place in which he had a conversation with Travis in July 1949) he was not shaken as to matters of substance. Neither his nor Eckert's testimony bore a death wound on its face; the testimony of neither was so inherently implausible or incredible as to require its rejection in view of Respondents' failure, despite opportunity, to refute it. Furthermore, their demeanor and manner of testifying impressed the hearing officer as indicating both willingness and effort to tell the truth.

Though Eckert's and Mason's testimony has thus been accepted by and large, Johnson's stands on a somewhat different footing. Also, a former Communist, Johnson testified in part as an expert on the subject of Communist infiltration of labor unions. Yet, his membership in the Communist Party had ended in 1940 (Eckert's lasted until 1948), and he admitted that he was without knowledge concerning the International Union, or its membership, or any of its locals, and that he was unacquainted with Travis or other officers of Mine-Mill. He also testified as an expert on the use by Communists of "Aesopian" language, but again his qualifications were far inferior to Eckert's. His indoctrination and training in Communist teachings and techniques had been shorter, and his schooling much less impressive, than Eckert's. Furthermore, cross-examination showed him to be somewhat vulnerable as an expert in recognizing and interpreting "Aesopian" language. However, much of Johnson's testimony was in general accord with Eckert's, by which it may be considered as corroborated and confirmed. In such respects and to such extent, it has been given full credence.

Proceeding now to a summary of the evidence in the light of the foregoing findings as to credibility, and based upon the entire record of the investigation, and on my observation of the witnesses, I make the following:

Findings of Fact

A. The compliance affidavits; the Travis statement

Maurice E. Travis, who was secretary-treasurer of International Union of Mine, Mill and Smelter Workers, executed under dates of August 4, 1949, December 20, 1949, December 12, 1950, November 8, 1951, December 19, 1951, December 3, 1952, and November 6, 1953, and thereafter filed with the Board, compliance affidavits pursuant to Section 9 (h) of the Act in which he swore in part that he was not a member of the Communist Party or affiliated with such party, and that he did not believe in, and was not a member of, nor did he support any organization that
67 believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods.

Pursuant to Section 9 (h), and predicated in part on said affidavits, the Board issued to the International Union letters of compliance under dates of August 8, 1949, September 27, 1949, January 3, 1950, August 4, 1950, September 27, 1950, December 21, 1950, August 2, 1951, November 30, 1951, January 8, 1952, September 16, 1952, December 8, 1952, September 28, 1953, November 16, 1953, and December 28, 1953.

In an article published on August 15, 1949, in the newspaper, "The Union," Travis stated his reasons for signing the first of his affidavits.[2] That newspaper is the official organ of the International Union, which publishes and distributes it to all of its members, the cost being defrayed by a part of the membership dues. It is found, accordingly, that the membership of the Union was officially apprised of, and was aware of, Travis' statement.

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[2] Since frequent references must be made to the text of that statement and since its interpretation is of crucial significance to the determination of the issues herein, a copy has been attached hereto as Appendix B.

That the published article was in fact Travis' was conclusively established by Mason's testimony concerning a conversation with Travis in July 1949, and by Travis' speech at the Union's 1949 convention in which he acknowledged the statement and made a further explanation of his views.

The text of Travis' statement will be fully considered under a subsequent section of this report (see Concluding findings, infra). It will suffice for the present to note, preliminary to reviewing the evidence which concerns Travis personally, that Travis admitted that he had been a member of the Communist Party but stated that he had resigned—"with the utmost reluctance and with a great sense of indignation"—in order to make it possible to sign the affidavit required by the Taft-Hartley Act.

B. Travis—the Union officer—the Communist

Most of the evidence concerning Travis' career as a Communist and as an officer of Mine-Mill was supplied by the testimony of Eckert and Mason, who were themselves both former Communists and former officials of the Union. Eckert (whose qualifications as an expert on Communism are later summarized) had been an active member of the Communist Party from 1930 to 1948, and was an employee and later an Executive Board member of Mine-Mill from 1942 to 1948, excepting a period of Army service in 1944-5. Mason joined the Communist Party in the early '30's, but had dropped his membership "a long time" before 1946. A copper miner for years and a member of Mine-Mill, he had become an Executive Board member in 1941, and served in that capacity in 1941 and 1942, and from 1945 to December 1953.

Travis' first connection with the Union, so far as is shown by the evidence, was as its Coordinator for Northern California in 1942, which was contemporaneous with Eckert's service as Coordinator for Southern California. Travis subsequently became executive assistant to the president and held that position until he became first vice-president in January 1947. From March to December 1947, he held the office of president, succeeding Reid Robinson, who had resigned. In January 1948, Travis became secretary-treasurer, and has held that office since.[3]

[3] Mason and Eckert both testified that Travis in fact "ran" the Union. In any event it is clear from the record that Travis was one of a small group of Communists which dominated Mine-Mill.

Eckert's testimony similarly established Travis' membership in the Communist party as far back as 1942.
68 Eckert testified that beginning then he had many conversations with Travis concerning Communism and the Communist Party and that he attended with Travis many Communist Party meetings, first in California and later at many different places throughout the country. In a number of his conversations with Travis (in 1946, 1947, and 1948), they discussed the necessity, under the program of the Communist Party, for using insurrectionary means, force and violence, to achieve the Communist objective of the overthrow of the Government.

From about 1945 to 1948, Eckert and Travis served together on the Steering Committee of the Communist Party within Mine-Mill, the function of that committee being to receive instructions from the Party and to carry out within the Union the policies and rocedures which the Party dictated. To insure compliance, the National Committee of the Communist Party (the top Communist committee in the country) designated a special liaison representative who actually sat as a member of the Steering Committee. The committee, comprised of about five members, at times held caucuses of Communists within the Union to decide, for example, on such matters as successors to vacant offices; and it considered, for example, in March 1948, whether affidavits of compliance should be made by Mine-Mill officers pursuant to Section 9 (h).

Eckert testified that he and Travis had also met in New York City in late 1947 or early 1948, with national leaders of the Communist Party (including William Z. Foster, national chairman, Eugene Dennis, general secretary, and John Williamson, trade union secretary), for the purpose of considering the question of Taft-Hartley compliance, and that after a lengthy meeting it was decided that, for the time being, compliance affidavits should not be made. Despite that decision, Eckert shortly led a movement to have the Mine-Mill officers execute compliance affidavits,

and, for his pains, he was removed in April 1948, from his office on the Executive Board following a caucus which Travis had called of the Communist representatives within Mine-Mill. Eckert thereafter terminated his membership in the Communist Party.

Slightly more than a year later, the Communist Party reversed its position on Taft-Hartley compliance, and Travis also switched over, obedient to the new line. Thus, Mason testified that in July 1949, Travis discussed with him in Chicago[4] the typewritten draft of the statement later published on August 15. Mason had inquired of Travis how the decision of the Executive Board to comply with the Taft-Hartley Act would affect Travis personally, whether it meant that Travis would have to resign as secretary-treasurer of the Union. Travis showed Mason the draft of his statement; told Mason that he had cleared it with Ben Gold and "the Party people" at Communist Party headquarters in New York, who had agreed that it was the best policy to follow and was in fact the general policy which would be followed by other Communists in the labor movement; and that it meant that while Travis was resigning his membership in the Communist Party, it would not stop or change his work for it.

Mason's testimony as to subsequent conversations with Travis established conclusively that Travis did continue his Party work within the Union, and that he had not in fact altered his allegiance to the Party. Mason and his associates in the Montana locals had been opposing the continued domination of the Union by Travis and other members of the Communist Party, and he and Travis held conferences in Butte and Denver in the summer of 1953 for the purpose of settling the hostilities between the Communist (Travis) faction and the anti-Communist (Mason) faction. Because those conversations show plainly that Travis had continued his adherence to and support of the

[4] Cross-examination cast some doubt on the place the conversation was held, but did not shake Mason on its substance, nor on the fact that it occurred in July 1949.

Communist Party, they will be summarized in some detail.

The Butte conference was devoted largely to Mason's attacks on the policies of the Communists within the Union and to Travis' defense of them. Mason insisted that Travis and his Communist associates should cease undermining the position of the anti-Communist leaders in the Montana locals, but Travis minimized the seriousness of the matter. Mason objected to the Communist Party's position on the Rosenberg case, but Travis insisted that it was the duty of the Union to do what it could to secure clemency for the Rosenbergs. Mason then compared the position which Travis and other Communists took on civil liberties within the Soviet Union and the satellite countries, pointing out the inconsistency of seeking clemency for the Rosenbergs in comparison with the persecution of certain persons behind the Iron Curtain. In response, Travis callously quoted with approval a remark he attributed to another Communist on the International Union's staff in British Columbia that, "when Stalin quits shooting people he will become suspicious that Stalin is going soft."

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At Travis' suggestion, Mason renewed the conference in Denver around August 11 or 12, 1953. Mason pleaded that due recognition be accorded the honest non-Communist opposition, arguing that there was room within the leadership of the Union for non-Communists as well as Communists. He also urged that free debates be permitted in the forthcoming convention on international questions, and that the official newspaper be liberalized so that it would not consistently favor the Soviet side in the cold war.

Travis' reply in general was to the effect that Mason wanted peace because he and his faction were weak, whereas Travis and his associates, being strong, would go ahead under their former policies. Answering Mason's request for non-Communist representation in the Union's leadership, Travis stated that Mason and his brother had a chance "to be way up with us in these councils if you would rejoin the Communist Party." As to Mason's criticism of the

newspaper, Travis rejected Mason's suggestions summarily, saying, "You know as well as I do that the Party and my people will not stand for those proposals." Travis added that one of the mistakes in policy which he and "the Party people within the officialdom" had made was in having issued the statement in connection with the signing of his affidavit.

C. The Union and its membership

The officers of the International Union consist of a president, two vice-presidents, and a secretary-treasurer, who, with district representatives elected by groups of locals, comprise the Union's Executive Board, which constitutes the governing body of the Union between its conventions.

Prior to February 1950, the International was affiliated with CIO, but was expelled at that time by CIO on a finding that the policies and activities of the International Union had been consistently directed toward the achievement of the programs and policies of the Communist Party.

As of January 1947, the International Union was comprised of about 400 locals, but that number has now dwindled to approximately 200, as a result of revolts and secessions over the issue of Communist domination of the International. The evidence does not establish the present total membership of the Union. At some points the record suggests a total of approximately 95,000 members, whereas the CIO committee report of February 1950 (which recommended the expulsion of Mine-Mill), reported that its dues-paying membership had dropped from a total of 100,000 in 1946-1947, to 44,000 in October 1949, which was before the secession of additional locals following the expulsion from CIO. Eckert testified that the number of Communists within the rank and file membership comprised less than one percent.[5]

[5] Although the program of the Communist Party envisions the control and domination of labor unions as a prime objective leading to the "dictatorship of the proletariat," it contemplates admission to its ranks of only a minority

70 As early as January 1947, the membership began to learn that major revolts were occurring within their ranks over the subject of the Communist domination of the International Union through Travis and other officers. The first such revolt, led by John J. Driscoll, resulted in the secession of a large group of locals; and literature distributed within the Union, apprised the membership that the issue of Communist domination was responsible for the breach.

In May 1947, a CIO committee issued its report (which was also distributed among the Mine-Mill membership) of its investigation of that breach, exposing fully the Communist Party connections and activities within the Union of Travis and other leaders. It reported also that Travis had been expelled from a Steelworkers' local (CIO), in 1941, for advancing Communist Party causes. The committee recommendations included a call for Travis' resignation or his removal from office.

The issue was emphasized and the breach was widened in March 1948, when Mine-Mill removed Eckert from the Executive Board because he had sponsored a movement, contrary to the decision of the Communist Party leaders and the Mine-Mill Executive Board, to comply with Section 9 (h). Eckert thereupon led the secession of a group of die-casting locals (which had originally merged with Mine-Mill in 1942), and he and his associates have continued since that time to inform the Mine-Mill membership through a variety of media (e.g., pamphlets, handbills, speeches, radio addresses) of the Communist domination of Mine-Mill through Travis and others.

Early in 1950, a special CIO committee, after investigation and hearing, issued its report in which it set forth at

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of the workers until such time as "the final overthrow of the capitalist order will have become an evident fact." See, e.g., Statutes, Theses, and Conditions of Admission to the Communist International, excerpts from which are quoted in the Appendix to the dissenting opinion of Mr. Chief Justice Stone in Schneiderman v. United States, 320 U.S. 118, at pp. 197, 200. More recently, Mr. Justice Jackson has outlined at some length the methods by which Communists effect the undercover capture of strategic labor unions. See, e.g., his concurring opinion in A. C. A. v. Douds, 339 U. S. 382, 431.

length its findings as to the Communist domination of Mine-Mill through Travis and other officers; and on the basis of that report, the CIO Executive Board ordered the expulsion of Mine-Mill.[6] Mine-Mill informed its membership through articles in "The Union," of the forthcoming investigation and hearing, and later informed them of the expulsion (a result which it had freely predicted in advance) by CIO on charges of Communist connections.

Eckert had testified at the hearing before the CIO committee as to the manner by which the Communist Party Steering Committee, including Travis, had imposed upon Mine-Mill the policies dictated by the party. His testimony was later printed in booklet form and was distributed in 1951, and since, among the Mine-Mill membership. Indeed, it was admitted in "The Union" that Eckert's testimony at the hearing had been published in newspapers.[7]

In October 1952, the Senate Sub-Committee (Judiciary Committee) held a hearing at Salt Lake City respecting the Communist affiliation of the principal officers of the International Union, including Travis. That hearing was attended, as suggested in "The Union," by 150 delegates from Mine-Mill locals who were then attending a "political action conference" in Salt Lake City. Many of those delegates, according to an article in "The Union," remained in the audience for 3 consecutive days so that they could report to their locals.

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Eckert repeated in that hearing testimony which he had given earlier before the CIO committee. Travis, also summoned as a witness, repeatedly invoked the Fifth Amendment in refusing to admit or deny membership in the Communist Party, in refusing to identify or acknowledge his

[6] During 1949 and 1950, the CIO expelled 11 national unions on findings that they had adhered to the Communist Party line. See LRR Analysis, Vol. 34, No. 33, p. 67. The strenuous efforts of CIO to rid its affiliated unions of Communist infiltration and domination was a matter of common knowledge during that period.

[7] "On the day after our 'trial' closed, the CIO 'leaked' to the press the stoolpigeon testimony of Ken 'Peeping Tom' Eckert. This made banner headlines in the Knight chain of newspapers." (Exhibit 30).

compliance affidavits, and in refusing to acknowledge authorship of his August 1949 article.[8] "The Union" published in all several articles concerning the hearing, including one by Travis and other Union officers which explained their reasons for invoking the Fifth Amendment.

Finally, early in 1954, Mason led a revolt in the Butte and Anaconda locals over the issue of Communist influence and domination of the International Union. That revolt was unsuccessful, however, resulting in a victory of the opposing faction in an election conducted by the Board in March.

D. The expert testimony

The General Counsel also adduced from Eckert and Johnson expert testimony concerning the doctrines and teachings of Communism and the use by Travis of certain "Aesopian" language in his article of August 15, 1949. Their qualifications on the former subject were established beyond question, since both had been fully indoctrinated in the teachings, the goals, and the methods of Communism and Communists. Eckert was also well qualified on the use by Communists of "Aesopian" language, though Johnson was less impressive on that point.

Eckert, an active member of the Communist Party from 1930 to 1948, had received a long and thorough indoctrination in the doctrines of Communism. He had studied at Communist schools in Moscow, to which he was sent by the Party, from 1932 to 1934. Eckert had in turn imparted his knowledge by teaching in Communist schools in this country. Among the basic Communist literature which he studied and taught were Lenin's Left-Wing Communism, an Infantile Disorder; Lenin's State and Revolution; Lenin's Imperialism, the Highest Stage of Capitalism; and Stalin's Foundations of Leninism.

Eckert testified that membership in the Communist Party was in fact predicated on acceptance of the teachings of

[8] Travis did admit, however, that the members of the Union were aware that allegations of Communism had been made against the Union for a long time.

Marx, Engels, Lenin and Stalin; that every Party member was required to subscribe to those teachings in toto; and that deviation from current teachings was ground for immediate expulsion. Under those teachings the ultimate goals of Communism could be achieved only by the overthrow of existing state governments by revolutionary means, i.e. by force and violence, and by the establishment of a "dictatorship of the proletariat," which was to exist during a transitional period (as presently in Russia) in preparation for the ultimate and ideal form of a Communist classless society.

That such teachings were not intended as so much theoretical dogma was established by Eckert's testimony that his education at the Lenin Institute extended to training in insurrection and revolutionary methods, including a course in the theory and tactics of armed uprising, practical training in making explosives, and actual field training in the handling of machine guns and small arms.

72 The infiltration and domination of trade unions was also one of the prime objectives of the Communists, who proposed thereby to direct the struggles of workers to improve their economic conditions into revolutionary channels for the forcible overthrow of the government in effectuation of the intermediate goal, the establishment of the proletariat dictatorship.

It is unnecessary to recite the various positions which Eckert held in the Communist Party upon his return to the United States, or his various assignments by the Party within labor unions. It will suffice to state that from 1934 to 1948 (excluding his period of war service), Eckert acted as the representative of the Communist Party in various posts in labor unions, following its instructions and devoting his efforts to furthering and achieving its policies. Evidence previously summarized affords a typical example: his service on the Party's Steering Committee within Mine-Mill with Travis, whom he had met and known as a Communist in 1942, and with whom he thereafter participated in Communist Party work within the Union.

Johnson had been a member of the Communist Party from 1930 to 1940. He received his indoctrination and training in New York City, with particular emphasis on the infiltration and domination of labor unions and on the negro question. He also studied some of the basic Communist texts which Eckert had identified and had, like Eckert, also received instruction in the use of "Aesopian" language. Johnson's first position in the Party was a District Agitation and Propaganda Director in Buffalo, but thereafter he served as its representative in various labor unions in New York City, carrying out the Party's instructions as handed down to him by the National Committee of the Communist Party and by its bureaus and subcommittees.

Johnson's testimony accorded with Eckert's that the Communist Party goals included that of the overthrow of our government by force and violence. Indeed, Johnson's training had included, and his duties were in part specifically directed toward, the eventual bringing about of a racial rebellion in the black belt of the United States.

As to Aesopian language, Eckert testified that its use as a Communist device to convey a double meaning had been originated by Lenin in his pamphlet, "Imperialism-The Highest Stage of Capitalism," which had been written originally in 1916, late in the czarist regime. In a preface to the Russian edition, published after the regime ended, Lenin disclosed that he had escaped czarist censorship by writing, with extreme caution, "in that cursed Aesopian language to which czarism compels all revolutionaries to have recourse whenever they took up their pens to write a legal work." Resort to such language has since been an accepted—indeed standard—part of Communist techniques for covering statements of Communist creed by an innocent terminology designed to prevent disclosure so far as consistent with the continued spread of the Communist gospel. Indeed, the Communist constitution of 1935 contained certain passages, innocent upon their face which seemingly subscribed to "democratic processes," but which were un-

derstood by the initiates to be only "window dressing" to cover the real teachings of the Party.

It is unnecessary to summarize at length the Eckert-Johnson testimony concerning Travis' use of "Aesopian" language; since its main value is to confirm what sufficiently appears from the face of his statement, as found under Section E, infra, that Travis admitted his continued adherence to the principles of Communism and his continued support of and allegiance to the Communist Party. The following examples will suffice.[9]

73 (a) This has not been an easy step for me to take. Membership in the Communist Party has always meant to me, as a member and officer of the International Union, that I could be a better trade unionist; it has meant to me a call to greater effort in behalf of the union as a solemn pledge to my fellow members that I would fight for their interests above all other interests.

While serving with Eckert on the Steering Committee of the Communist Party within Mine-Mill, Travis had received from the Communist Party and had carried out instructions and policies many of which disqualified Travis as a good trade unionist, and which in fact injured and otherwise worked to the detriment of the membership of the Union.

In saying that he could be a better trade unionist by being a Communist, Travis was using the term in the sense in which it is used in the Soviet Union where trade unions are instruments of the state, used to suppress the rights of labor and prevent its attempts to improve wages, hours, and conditions of employment.

(b) It is a big lie to say that a Communist trade unionist owes any higher loyalty than to his union. On the contrary, trade unions are an integral part of a Socialist society, the kind of society in which Communists believe. Therefore, I believe that good Communists are good trade unionists.

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[9] Each excerpt is followed by a brief digest of Eckert's testimony. As previously indicated, Johnson's testimony as an "Aesopian" language expert has been credited in the respects in which it was corroborated and confirmed by Eckert's.

Travis' membership in the Party had required that he subscribe to the principles of the Communist Party and to the teachings of Marx, Engels, Lenin, and Stalin. They teach that a Communist has only one loyalty, that to the Soviet Government.

By Socialist society, Travis meant the type of society established in Russia under the Soviet dictatorship. The role of the trade unions in that society is to act as an instrument of the state in the maintenance of power by the Communist Government; they are in fact used as vehicles for the dissemination of propaganda of the Communist Party and to carry out its objectives.

(c) Therefore, I want to make it crystal clear that my belief in Communism is consistent with what I believe to be the best interests of the members of this Union and the American people generally and that I am especially happy to be able constantly to remember that it is consistent with the finest traditions of the International Union.

As a Communist, Travis had subscribed to the belief that the best interests of the American people would be the overthrow of their Government by force and violence and the establishment of a dictatorship of the proletariat. Though disguising those aims to the uninitiated, Travis was making it abundantly clear that he still subscribed to those beliefs and practices.

(d) In the meantime, I am sure that every member of the International Union joins me in my pledge to fight to keep this International Union strong, to bend every effort to make it even stronger, to continue to keep it on a progressive, militant course, and to do everything in my power to make life in our country happy, secure, prosperous and peaceful.

Under Communist terminology, which Travis was here using, the only progressives are Communists, and anyone advocating any other policy, especially in trade unions, is

a reactionary. Thus, in the phrase, "progressive, militant course" Travis was reiterating and reaffirming his intention to continue his work as a Communist in the Union in the future as he had in the past.

74 E. Concluding findings

Issue I—Whether Travis has admitted the falsity of his compliance affidavits

The first question here to be determined is that on which ruling was reserved in the June 7 order (Appendix A), i. e., whether Travis' published article carried on its face an admission that his affidavit was false. That question is to be resolved, of course, from the full text of the article, whose meaning may also properly be sought in the light of the undisputed evidence of Travis' long established position as a member of the Communist Party and as one of its leaders within Mine-Mill. Also appropriate for consideration in discerning the true meaning of the statement are such facts as were contemporaneously of general and common knowledge concerning the nature and goals of Communism. In the latter connection, the chief problem consists of bringing into proper focus the situation regarding such awareness as it existed in the summer of 1949, when the statement was made. Though that obviously presents a difficulty as of 1954, the difficulty lies only in the necessity for review of a plethora of existing evidence which relates to the time in question. And since that evidence constitutes a part of the setting in the light of which Travis' statement is properly to be evaluated, it will be reviewed preliminary to considering the content of the statement.

The awakening to the full import of the Communist menace has come slowly in this country, retarded doubtlessly during World War II by unwillingness to believe the worst about an ally who was enlisted with us in a death struggle against followers of still another foreign ideology repugnant to our own ideals of government. Though slow in inception, there has been a progressively faster develop-

ment during past years of the general awareness of the true nature, aims, and methods of Communism and the Communist Party, an awareness which has been accelerated rapidly in recent years by the defections of former Communists and the well-publicized exposure of their experiences and training within the fold and by the investigations of a number of congressional committees, also well publicized, preliminary to the enactment by Congress of legislation such as the present, (61 Stat. 136, enacted June, 1947),[10] the Smith Act (54 Stat. 670, enacted June, 1940); and the Internal Security Act of 1950 (64 Stat. 987, enacted September, 1950).

75 Judicial recognition has followed behind, and has sustained, the legislative findings which supported the foregoing legislation. The full significance of such pronouncements can best be understood by referring first to an earlier decision of the Supreme Court with which they were apparently in conflict. Thus, though in Schneiderman v. United States, 320 U. S. 118 (decided June, 1943), a majority opinion of the Supreme Court had expressed views contrary to the congressional findings which were basic to the legislation above mentioned, those views were based on conclusions whose naïveté the minority (Chief Justice Stone; Justices Roberts and Frankfurter) had challenged at the time. (See concurring

[10] Though as Mr. Justice Jackson pointed out in his concurring opinion in A. C. A. v. Douds, 339 U. S. 382, 424 (in which the Supreme Court upheld the constitutionality of Section 9 (h), most of the voluminous evidence before the several congressional committees would be of doubtful admissibility or credibility in a judicial proceeding, its persuasiveness, validity, and credibility for legislative purposes was for Congress; and he agreed that from such information before it and from facts of general knowledge, Congress could rationally conclude that, behind its political party facade, the Communist Party is a conspiratorial and revolutionary junta, organized to reach ends and to use methods which are incompatible with our constitutional system.

The publicizing of the congressional hearings and findings also furthered, of course, the general awareness of the nature of the Communist conspiracy. That the sum total of general knowledge on the subject may rest in part on literature and evidence of doubtful admissibility in a judicial proceeding or a criminal trial does not gainsay the fact of knowledge. Thus, awareness of current facts of general knowledge must usually be acquired through a variety of media (e. g., the press, radio, television, and news reports and analyses) whose product would certainly fail to meet the strict standards required of evidence in a court trial.

opinion of Mr. Justice Jackson in Dennis v. United States, 341 U. S. 494, at pp. 568-9, fn. 12.) Certainly the majority views must presently be considered naïve[11] in the light of the subsequent repeated congressional findings (based on increasingly voluminous and persuasive evidence) and the judicial affirmance of those findings, with express refusal in some instances to accept the majority views in Schneiderman as authoritative.

Thus, in United States v. Dennis, 183 F. 2d 201, 210 (C. A. 2), aff'd. 341 U. S. 494, supra the Court of Appeals, speaking through Chief Judge Learned Hand, characterized the Schneiderman holding as one which "stands apart," observing that:

[I]t held that the prosecution had not adequately proved that Schneiderman, though a Communist, was not "attached to the principles of the Constitution," when he was naturalized. The majority thought that being a Communist might involve no more than what the defendants at bar say that it does involve: to foster revolutionary changes, but only by lawful methods. All that can be thought relevant to the case at bar is a passage in the opinion, which may have been meant to imply that only "agitation and exhortation calling for present violent action which creates a clear and present danger of public disorder or other substantive evil," 320 U. S. at page 157, 63 S. Ct. at page 1352, 87 L. Ed. 1796, will show that one is not attached to the "principles of the Constitution."

[11] Its conclusions were summarized by Justice Jackson in his concurring opinion in the Dennis case, supra, substantially as follows: That the Court held that the basic Communist literature, which it had reviewed, was within "the area of allowable thought"; that it did not show lack of attachment to our Constitution, and that success of the Communist Party would not necessarily mean the end of representative government; that it was a tenable conclusion that the Party "desired to achieve its purpose by peaceful and democratic means, and as a theoretical matter justified the use of force and violence only as a method of preventing an attempted forcible counter-overthrow once the Party had obtained control in a peaceful manner or as a method of last resort to enforce the majority will if at some indefinite future time, because of peculiar circumstances, constitutional or peaceful channels were no longer open"; and that this "mere doctrinal justification or prediction of the use of force under hypothetical conditions at some indefinite future time—prediction that is not calculated or intended to be presently acted upon, . . ." was within the realm of free speech.

Of the eight justices who took part in the decision, three dissented, and of the five who concurred two wrote separate opinions. It is true that both these said that they joined in the opinion in chief; *but we should hesitate*
76 *to say that by this they meant to commit themselves to the proposition that a man may be attached to the principles of a constitution, whose violent overthrow he will continue to advocate and teach, because he knows that the execution of his purpose must be deferred for a time.* We should feel bound to await a more definite declaration before accepting a doctrine, which, with deference, seems to us so open to doubt. (Italics supplied.)

Though written in 1950, the Dennis decision related to a period, a subject matter, and a stage in the development of awareness of the aims of Communism which renders it of utmost significance and timeliness for the purpose of discerning, as of August, 1949, the true meaning of Travis' article. Thus, the case involved the conviction of a number of Communist Party leaders under an indictment which had been returned in 1948, for violating the conspiracy provisions of the Smith Act, supra, during the period from April, 1945, to July, 1948. The trial lasted from March to September, 1949.

In affirming the conviction, the Court of Appeals, after review of the "abundant evidence" before the jury, thus described the Communist Party and its operations:

The American Communist Party of which the defendants are the controlling spirits, is a highly articulated, well-contrived, far-spread organization, numbering thousands of adherents, rigidly and ruthlessly disciplined, many of whom are infused with a passionate Utopian faith that is to redeem mankind. It has its Founder, its apostles, its sacred texts—perhaps even its martyrs. It seeks converts far and wide by an extensive system of schooling, demanding of all an inflexible doctrinal orthodoxy. The violent capture of all existing governments is one article of the creed of that faith, which abjures the possibility of

success by lawful means. That article, which is a commonplace among initiates, is a part of the homilectics for novitiates, although, so far as conveniently it can be, it is covered by an innocent terminology, designed to prevent its disclosure.[12]

The defendants had protested that the use of force and violence was no part of their program except as it might become necessary after the "proletariat" has succeeded in securing power by constitutional processes, and that then, being the constitutional government, it will of course resist any attempt of the ousted "bourgeoisie" to regain its position, meeting force with force, as all governments may and must. (Compare the Travis' statement.) The Court, however, after examining the pamphlets and books which the defendants had published and disseminated, found that many of the passages therein, and that the doctrines of Marxism-Leninism, which the defendants had taught, flatly contradicted their declarations that they meant to confine the use of force and violence to the protection of political power, once lawfully obtained. Thus the court found that those doctrines recognized explicitly that the "dictatorship of the proletariat" (which they advocated as a necessary transitional period during the march to ultimate and ideal communism), could only be established by a violent overthrow of any existing government, if it be capitalistic, because:

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No entrenched bourgeoisie, having everything to lose and nothing to gain by the abolition of capitalism, by which alone it can continue to enjoy its privileged position, will ever permit itself to be superseded by the means which it may have itself provided for constitutional change: e. g.

[12] In Frankfeid v. United States, 198 F. 2d 679, 684-686 (C. A. 4), cert. den. 344 U. S. 922, the Court, in affirming another conviction under the Smith Act, reviewed similar "abundant evidence" and similar defenses to those asserted in the Dennis case, and reached conclusions which were in complete accord with the views expressed in Judge Hand's opinion.

See also United States v. Schneiderman, 106 F. Supp. 906, 921-922 (S.D. Cal.), where the Court referred to "the common notoriety" that the objective of the Communist Party is the overthrow of the Government by force and violence, and cited voluminous authority in support of the view that the courts might properly take judicial knowledge of that fact.

by the ballot. No matter how solemnly it may profess its readiness to abide the result, and no matter how honestly and literally the accredited processes of amendment may in fact be followed, it is absurd to expect that a bourgeoisie will yield; and indeed to rely upon such a possibility is to range oneself among the enemies of Marxist-Leninist principles. Therefore the transition period involves the use of "force and violence," temporary it is true, but inescapable; and, though it is impossible to predict when a propitious occasion will arise, one certainly will arise: as, for example, by financial crisis or other internal division. When the time comes the proletariat will find it necessary to establish its "dictatorship" by violence.

The court found it unnecessary to hold that even so thoroughly planned and so extensive a "confederation" as the Communist Party constituted would be a present danger at all time and in all circumstances, since the question before it was how imminent, i.e., how probable of execution it was in the summer of 1948, when the indictment was found. Then, afte summarizing world conditions as they existed at that ime and our position in relation thereto, the Court concluded:

We do not understand how one could ask for a more probable danger, unless we must wait till the actual eve of hostilities. The only justification which can be suggested is that in spite of their efforts to mask their purposes, so far as they can do so consistently with the spread of the gospel, discussion and publicity may so weaken their power that it will have ceased to be dangerous when the moment may come. That may be a proper enough antidote in ordinary times and for less redoubtable combinations; but certainly it does not apply to this one. *Corruptio optimi pessima.* True, we must not forget our own faith; we must be sensitive to the dangers that lurk in any choice; but choose we must, and *we shall be silly dupes if we forget that again and again in the past thirty years, just such preparations in other countries have aided*

to supplant existing governments, when the time was ripe. [Italics supplied.] Nothing short of a revived doctrine of laissez faire, which would have amazed even the Manchester School at its apogee, can fail to realize that such a conspiracy creates a danger of the utmost gravity and of enough probability to justify its supression. We hold that it is a danger "clear and present."

78 The Supreme Court expressed accord with those findings, holding that (341 U. S. 494, at pp. 510-511):

The mere fact that from the period 1945 to 1948 petitioners' activities did not result in an attempt to overthrow the Government by force and violence is of course no answer to the fact that there was a group that was ready to make the attempt. The formation by petitioners of such a highly organized conspiracy, with rigidly disciplined members subject to call when the leaders, these petitioners, felt that the time had come for action, coupled with the inflammable nature of world conditions, similar uprisings in other countries, and the touch-and-go nature of our relations with countries with whom petitioners were in the very least ideologically attuned, convince us that their convictions were justified on this score.

Affirming the conviction in conclusion, the Court stated (id. at pp. 516-517):

Petitioners intended to overthrow the Government of the United States as speedily as the circumstances would permit. Their conspiracy to organize the Communist Party and to teach and advocate the overthrow of the Government of the United States by force and violence created a "clear and present danger" of an attempt to overthrow the Government by force and violence.

In separate concurring opinions, Mr. Justice Frankfurter (id. at pp. 517-556) and Mr. Justice Jackson (id. at pp. 561-579) supported more emphatically and in more detail the findings of the lower courts as to the true nature of Communism and of the Communist conspiracy in this

country. See, e. g., Justice Frankfurter's opinion at pp. 547-548, and note particularly the following statement:

We may *take judicial notice* that the Communist doctrines which these defendants have conspired to advocate are in the ascendancy in powerful nations who cannot be acquitted of unfriendliness to the institutions of this country. *We may take account of evidence brought forward at this trial and elsewhere, much of which has long been common knowledge.* [Italics supplied.]

Most timely also for bringing into focus the extent to which general awareness had developed, prior to the summer of 1949, of the nature and aims of Communism is the case of National Maritime Union v. Herzog, 78 F. Supp. 164 (D. D. C.) decided April 13, 1948. There, in sustaining the constitutionality of Section 9 (f), (g), and (h) of the present Act, the Court reviewed at length the evidence before Congress (id., pp. 167-169), such as "matters of general knowledge," including the President's message to Congress, and prior published views of Joseph Curran (president of the plaintiff union which had sought to enjoin enforcement of the Act). The Court found the statements by the President and by Curran to be "expressive of the *community's very recent evaluation of the danger which* Congress foresaw in 1947." (Italics supplied.)

Though affirming that judgment as to Section 9 (f) and (g), 334 U. S. 854, the Supreme Court did not find it necessary to reach or consider the validity of Section 79 9 (h). It did, however, reach that question in A. C. A. v. Douds, 339 U. S. 382, in a decision which contained further judicial recognition of the goals of Communism and of the Communist Party in specific relation to labor unions. There, in upholding the constitutionality of the very section pursuant to which Travis had made his affidavits, the Court reviewed the evidence and the "great mass of material" which had been before the various committees of Congress (id. at pp. 387-389) pre-

paratory to enactment of the legislation in 1947, and found that it supported the legislative findings that:[13]

. . . Communists and others proscribed by the statute had infiltrated union organizations *not to support and further trade union objectives, including the advocacy of change by democratic methods*, but to make them a device by which commerce and industry might be disrupted when the dictates of political policy required such action. [Italics supplied] (Id. at p. 389.)

Congress could rationally find that the Communist Party is not like other political parties in its utilization of positions of union leadership as means by which to bring about strikes and other obstructions of commerce for purposes of political advantage, and that many persons who believe in overthrow of the Government by force and violence are also likely to resort to such tactics when, as officers, they formulate union policy. (Id. at p. 391.)

Congress might reasonably find, however, that Communists, unlike members of other political parties, and persons who believe in overthrow of the Government by force, unlike persons of other beliefs, represent a continuing danger of disruptive political strikes when they hold positions of union leadership. (Id. at p. 393.)

Mr. Justice Jackson, in a separate opinion in which he concurred in those holdings (id. at pp. 424-433), reviewed at length the voluminous evidence before the Congressional committees, and drew the conclusion that:

From information before its several Committees and from facts of general knowledge, Congress could rationally conclude that, behind its political party facade, the Communist Party is a conspiratorial and revolutionary junta,

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[13] Subsequent legislative findings have only confirmed and emphasized the correctness of the earlier ones. For a full recapitulation, see the findings contained in the face of the Subversive Activities Control Act, Title I of the Internal Security Act of 1950, 64 Stat. 987 (approved in Galvan v. Press, 347 U. S. 522). See also the report of the Subversive Activities Control Board, S. Doc. 41, 83rd Cong., 1st Sess. (Gov't. Print. Off., 1953) for an exhaustive description and documentation of the history and activities of the Communist Party (USA) since its inception in 1919.

organized to reach ends and to use methods which are incompatible with our constitutional system.

The foregoing decisions point up the full significance of the dissenting opinion in the Schneiderman case, 320 U. S. 118, supra, since they are in substantial accord with the views expressed by Mr. Chief Justice Stone in 1943 after review of the basic Communist literature which was then before the Court (See Appendix, 320 U. S., at pp. 197-207). Thus subsequent decisions have reflected implicit recognition of the correctness of the dissenters' findings that the Communist Party organization was a revolutionary party having as its ultimate aim generally, and particularly in England and the United States, the overthrow of capitalistic or bourgeois government and society, and the substitution for it of the dictatorship of the proletariat.

80 The undisputed evidence in the present record does no more than confirm the earlier legislative findings, and the judicial concurrence, as to the nature and aims of the Communist conspiracy, which, as has been shown, had become widely known by the summer of 1949. The Eckert-Johnson testimony as to the doctrines and methods of Communism was in full accord with the evidence summarized in the foregoing decisions; and Eckert's testimony established that the obligations of Communist Party membership to which he and Travis had subscribed were identical with those required of all members of the Party, including, for example, the Dennis defendants.

It is in the light of the foregoing and the evidence of Travis' established position among Communist leaders, both within and without Mine-Mill, that his published statement must be read. A short year and a half before the Communist Party did its flip-flop on the question whether it would authorize its members to execute compliance affidavits, Travis had participated with the national leaders in the Party councils which had con-

sidered the matter. He not only obeyed the decision then reached not to comply, but participated in "purging" Eckert from his office in Mine-Mill for advocating the contrary. When in 1949, the Party reversed its position on compliance, Travis not only flopped over obediently, but cleared with the Party leaders at Party headquarters the text of the very statement which constituted the Party's general policy on the subject. Thus, the Communist Party had, as usual, dictated the course to be followed by its representatives among labor union leadership throughout the country, and Travis had, as usual, followed its dictates in making his affidavit and in issuing his statement apologizing for his action.

The foregoing background obviously requires that the statement be scrutinized with utmost care to ascertain whether Travis had in fact made a voluntary and bona fide renunciation of his allegiance to the principles of Communism and the Communist Party, which had constituted a bar to signing the affidavit in the past (cf. A.C.A. v. Douds, supra, at p. 414), or whether it showed to the contrary that Travis, despite his claimed resignation, was nevertheless continuing his adherence to and his support of the doctrines and teachings of Communism. When so scrutinized, the essential sham and hypocrisy of the statement plainly appears; it stands revealed in its entirety as a cleverly worded, but nonetheless recognizable, piece of Communist propaganda which, despite its efforts to mask its purposes in an innocent terminology, showed that it was devoted to continuing the spread of current Communist gospel among the membership of Mine-Mill.

The entire statement obviously constituted an apology by Travis for having signed the affidavit[14] and a eulogy of the principles of Communism and the Communist Party. It was, of course, much too late for Travis to deny convincingly that the Communist Party teaches or advocates the overthrow of the government by force and violence, or

[14] E. g., "I have decided with the *utmost reluctance* and with *a great sense of indignation* to take such a step." (Italics supplied.)

to deny that he subscribed to any such belief. His admitted membership in the Party—"a highly organized conspiracy"—gave the lie to those denials, since, as other adherents—"rigidly and ruthlessly disciplined"—he had been necessarily required to subscribe to the creed of the violent capture of all existing governments, abjuring the possibility of success by lawful means. See the Dennis case, supra, 183 F. 2d at p. 212.

It is true that in avowing his continued beliefs in the teachings of Communism, Travis endeavored to state them innocuously and to equate them with the aims of the International Union, of labor generally, and with the best interests of the American people, but that statement was at best a thinly disguised effort to capitalize on the prestige among the membership of the charter of the International Union and the Bill of Rights. Its hypocrisy was elsewhere exposed by Travis' expressed conviction that "only
81 a fundamental change in the structure of our society" was necessary, and his stated belief that, "when the majority of the American people see clearly how rotten the foundation of the capitalist system is, they will insist on their right to change it through democratic processes, and all of the reactionary force and violence in the world will be unable to stop them."

The foregoing statements, though differently phrased, correspond in substance to the protestations being made contemporaneously by the defendants during the trial of the Dennis case that their (Communist) program envisioned that the proletariat would succeed in securing power by constitutional processes; that the entrenched bourgeoisie would, failing to yield, resort to force to maintain their privileged positions, thereby forcing counter-resort by the proletariat to force and violence to insure their victory. Dennis case, supra, at p. 206. That the similarity was no mere accident or coincidence, was plainly disclosed by Travis' subsequent speech in the 1949 convention where he made a further explanation of his action

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in signing the affidavit. Travis then stated his conviction that the "employers" will never permit the "workers" to realize the fruits of their election victories, such as the nationalization of major industries, that:

They wouldn't permit it to happen in Spain and they wouldn't permit it to happen in Italy and they wouldn't permit it to happen in other countries where workers have been able to elect people into offices. *The answer in these cases was military violence against the workers and then I say the workers will have to fight back.* (Italics supplied)

But as was shown by the Dennis case (id., p. 206), the great mass of evidence as to the teachings of Communism and the Communist Party organization, current and extant in 1949, flatly contradicted declarations that Communists mean to confine the use of force and violence only to the protection of political power once lawfully obtained. Thus, it is plain that what Travis and the Dennis defendants were doing at the time was to repeat and to spread the Communist doctrine that the Communist Party justifies the use of force and violence as a theoretical matter only as a means of preventing an attempted forcible counter-overthrow once the Party had obtained control in a peaceful manner.

Furthermore, the mouthing of such terms as "democracy" and "democratic processes" was an obvious example of concealment in an innocent terminology of such Communist teachings as that quoted by Mr. Chief Justice Stone in the Schneiderman dissent, 320 U. S., supra, at p. 192:

"That which before the victory of the proletariat seems but a theoretical difference of opinion on the question of 'democracy' becomes inevitably on the morrow of the victory a question which can only be decided by force of arms."

Further corroboration that Travis had in fact made no bona fide alteration of his loyalties to Communism was also furnished by his persistent equation of Socialism with

Communism and his espousal of Socialism as the answer to all the ills of capitalism and as the means by which was to be accomplished that "fundamental change in the structure of our society" which he was advocating. Stated loosely, it may be said that perhaps the chief difference between Communism and Socialism, as we know it, is that the latter advocates the acquisition of control by the State over all means of production by peaceful methods and within the constitutional framework. However, as has been found, Travis' membership in the Communist Party had required that he adhere rigidly to the Communist doctrine that such control can be won only by force and violence, abjuring the possibility of success by lawful means. The Socialism which Travis was thus espousing was plainly the Communist variety, packaged in Russia, and bearing the brand name and
82 label of U.S.S.R. — Union of Socialist Soviet Republics.

Indeed, that Travis neither saw nor intended any difference between the terms Socialism and Communism was apparent from his eulogy to Haywood:

I have always been inspired by the fact that early leaders of the union were *socialistic* in one form or another, that Bill Haywood *also took the road to Communism and* died not only as a great leader of the working class but as *an honored and respected Communist.* (Italics supplied.)

In essence then, the Travis' statement boils down to the allegations made by Precision Scientific Company, as summarized in the words of the Board's order: That Travis stated that he had resigned from the Communist Party to make it possible for him to execute his affidavit of compliance, but he nevertheless continued to believe in the principles of Communism and the Communist Party. It is accordingly found that Travis' statement disclosed on its face his admission of the falsity of his first affidavit.

As for the subsequent affidavits, there is no evidence that Travis has since altered his allegiance to the Communist

Party or his loyalties to or beliefs in Communism. Undisputed evidence established that he has not done so. It suffices here to refer to Mason's testimony concerning his conversations with Travis in Butte and Denver as late as the summer of 1953, during which Travis admitted the continued domination of the Union by his own Communist faction and rejected Mason's appeals for representation among the Union leadership of the anti-Communist group which Mason led.[15] The evidence therefore establishes Travis' admission of the falsity of all of his affidavits.

The foregoing findings dispose of all questions which need to be resolved under Issue I, save for the General Counsel's alternative theory that Travis' admissions of falsity were established in any event by certain "Aesopian" language in which he phrased portions of his statement. The order of June 7 made the interim finding that the Eckert-Johnson testimony had established a prima facie case on that point. That testimony having been credited and accepted herein (Johnson's to the extent it is confirmed or corroborated by Eckert's), the earlier finding is hereby affirmed. That evidence has, however, become of slight importance to the determination of the present issue; it serves only to confirm the soundness of the findings made above, which were made independently thereof.[16]

83 Thus, if any doubt had existed that Travis' state-

[15] In the face of those clear admissions, it is unnecessary to rely on such inferences as might be drawn from Travis' refusal to testify at the hearing before the McCarran Sub-Committee in Salt Lake City in October, 1952, concerning either his compliance affidavit, or his published statement, or his membership in the Communist Party. Stronger and more direct inferences supporting the findings herein (if such support can add aught to the uncontradicted evidence in the record) may more readily be drawn from Travis' refusal to honor the General Counsel's subpoena in this investigation and his failure to appear and testify in his own behalf or to offer any evidence to controvert that adduced by the General Counsel. See cases cited at page 3, supra.

[16] The chief significance of the "Aesopian" language testimony arises if it were found—contrary to the findings herein—to be indispensable to proof that Travis' statement admitted the falsity of his affidavit, for in that case it would preclude a finding of membership awareness. See discussion under Issue II, infra.

ment carried on its face an admission of his continued allegiance to Communism and the Communist Party, it would have been wholly dispelled by the Eckert-Johnson testimony, which exposed, for example, the true status of labor unions under a Communist government, the falsity of Travis' claims that membership in the Communist Party meant being a better trade unionist, that good Communists are good trade unionists, and that a Communist trade unionist owes no higher loyalty than to his union. That testimony similarly confirmed that Travis had used the terms "democracy" and "democratic processes" in the sense they are employed under Communist regimes and by Communists, who use the terms as so much "window-dressing," since they in fact equate democracy with Communism and negate the possibility of the existence of the former in a capitalistic state.

Issue II — Whether the membership was aware of the falsity of Travis' affidavits

The interim finding was made in the order of June 7 that if Travis' admission of the falsity of his affidavit were found on the face of his published statement, the memberships' awareness of such falsity had been established, prima facie, by evidence of the publication of the statement in the Union's official newspaper and its distribution to all Union members. That evidence not having been controverted, and Travis' admissions having been found on the face of his statement, the finding is to be affirmed unless now found to be erroneous. But no error appears; its soundness and accuracy is established by the record.

Much that was said under Issue I is of equal application here, and need not be repeated. As there pointed out, there was general awareness in this country, no later than the summer of 1949 in any case, of the true nature, aims, and methods of Communism and the Communist party. Judicial decisions have in fact acknowledged that much of the evidence had been of general and common knowledge,

and that only "silly dupes" could longer have ignored facts established by 30 years of current history. The mass membership of the International Union, conceded to be "average" and "loyal" Americans, shared thus in the general awareness on the subject.

If regarded, then, only as members of the general public, the members of the Union were as well equipped as any to recognize Travis' statement, despite his claimed resignation from the Communist Party, as a reaffirmation of his allegiance and his loyalty to principles which he had ostensibly foresworn. In that status alone, they were aware that Travis had sworn falsely.

Actually, as the evidence shows, the Mine-Mill membership was much better equipped than the general public properly to evaluate Travis' statement; they occupied what might be termed a privileged position for that purpose, being acquainted with many facts concerning Travis' and the Communist domination of Mine-Mill which were unknown at the time to the public generally. Thus the evidence summarized under Section D, supra, showed that early in 1947 the membership learned that breaches had occurred within their ranks over the matter of the Communist domination of the Union through Travis and other leaders. The CIO committee report of May, 1947, exposed particularly Travis' Communist activities and called for his resignation or removal from office. Again in 1948, the secession of the die-casting locals, led by Eckert, augmented membership awareness that the issue of Communist Party membership of the International's officers had again cost the Union a large bloc of locals; and Eckert procured widespread dissemination among the membership of information that it was through Travis that Communist domination was being exerted. It would in fact be an incredible assumption that in the face of such major revolts, knowledge could be kept from the membership of the issues which had caused the defections.

84 Under the foregoing circumstances the member-

ship could, in no case, be required to read Travis' statement in a vacuum, or even only with the awareness of the general public. By reputation and report (confirmed finally by his published admission) they knew him as a hardened Communist of some years of standing,[17] and were thus enabled the more easily to recognize the utter sham of his pretended renunciation, the actual reaffirmation, of his loyalties to the principles of Communism and the Communist Party.

As for subsequent periods, the evidence confirms more emphatically the membership's awareness of the falsity of the affidavits which Travis had given. CIO's strenuous campaign in 1949 and 1950, to rid its ranks of unions bearing the Communist taint, received wide publicity; it was a matter of common knowledge, certainly in all labor circles. The Mine-Mill membership was directly involved, since the International Union was one of eleven which were expelled by CIO for adhering to the Communist Party line. Knowledge of the committee hearings, of its report, and of CIO's expulsion of the International was brought home to the membership by articles published in "The Union."

Similarly, that newspaper carried accounts concerning the Sub-Committee hearings in Salt Lake City in 1952. That hearing, which directly concerned the question of Communist domination of the International, was in fact attended, at the instance of "The Union," by some 150 delegates from all parts of the country. Eckert's testimony concerning his own and Travis' participation in Communist Party activities within Mine-Mill, given both at Salt Lake City and before the earlier CIO committee, was printed and disseminated widely among the membership. It is, therefore, concluded and found on the basis of all the evidence, that the membership of the Union was aware

[17] Though Travis' statement did not divulge for how long he had been a member of the Communist Party, it was to be fairly inferred from it that his membership covered at least the period during which he had held offices in the Union. Information had reached the membership in 1947 of his Communist Party connections, and the CIO committee report showed that he had supported Communist causes as far back as 1941.

of the falsity of all of Travis' affidavits, and that, despite such awareness, it has continued to reelect him to an office in the Union.

There remains for consideration under Issue II the matter of the "Aesopian" language testimony and its effect on the question of membership awareness. Indeed, that testimony would become conclusive on that issue were it found—contrary to the findings under Issue I—to be indispensable to proof that Travis' statement contains an admission of the falsity of his affidavit, for in that event, as found in the June 7 order, it would preclude a finding of membership awareness. That latter conclusion is plainly sustained by the excerpts from Eckert's testimony which are quoted in full in the June 7 order (Appendix A), and which need not be here recopied. Thus, if the General Counsel's case were found to depend on the "Aesopian" language testimony to establish Travis' admissions, the evidence would require a negative finding on membership awareness.

This brings up a patent misinterpretation by Respondents of the interim findings which were made in the order of June 7. Respondents argue in their brief that the Board has no jurisdiction, and the Hearing Officer no power, to make findings on Travis' admissions of falsity because of the Hearing Officer's earlier finding, in disposing of the General Counsel's "Aesopian" language theory, that the evidence supporting it failed to establish membership awareness. But Respondents' argument mis-reads that finding as if it were one which also disposed of the
85 alternative bases on which the General Counsel had proceeded. However, the order plainly showed the contrary: the finding that the General Counsel had failed to establish membership awareness was limited exclusively to his alternative contention that Travis' admission of falsity was in any case established by the "Aesopian" language testimony. Indeed, it was elsewhere found specifically that, assuming Travis' admissions were contained

on the face of the article (a question on which no opinion was then expressed), the General Counsel's evidence had established *prima facie* the membership's awareness of falsity.

Dated at Washington, D. C., this day of September, 1954.

GEORGE A. DOWNING
Hearing Officer

86 APPENDIX A

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D. C.

Maurice E. Travis, Secretary-Treasurer, International Union of Mine, Mill and Smelter Workers, and Compliance Status of International Union of Mine, Mill and Smelter Workers

ORDER

Oral argument was heard on June 4, before the undersigned Hearing Officer, on the question whether the General Counsel's evidence established prima facie the affirmative of the issues specified in the Board's order of February 4, 1954. Preliminary to stating the ruling on that question, the Hearing Officer hereby receives in evidence General Counsel's Exhibits 25 through 38, inclusive, on which ruling had been reserved.

Under the Board's Order, the Hearing Officer was directed to receive evidence pertaining to the issues (1) whether Maurice E. Travis has admitted that his compliance affidavits filed with the Board were false, and (2) whether the membership of the Union was aware that such affidavits were false. The order was based specifically on allegations by Precision Scientific Company that Travis

had stated in an article dated August 15, 1949, published in the Union's official newspaper and distributed to members of the Union, that he had resigned from the Communist Party to make it possible for him to execute a compliance affidavit filed with the Board, but that he nevertheless continued to believe in the principles of Communism and the Communist Party. The Board stated that its opinion was that those allegations, if true, would establish (a) that Travis' compliance affidavits were and are admittedly false; (b) that the membership of the Union was and is aware of the falsity of the said affidavits; and (c) that the processes of the Board have been and are thereby being abused.

Reading the Order literally, then, the issues specified by the Board might be determined within a narrow area; they would turn on whether the evidence would establish the following facts.

1. That the affidavits were in fact Travis'.

2. That the Article was in fact Travis' statement.

3. That it was published by the Union and distributed to its members.

4. That it contained the statements recited in the Order.

The General Counsel has unquestionably made out a prima facie case on the first three points, and whether he has done so on the fourth one is a matter of interpreting Travis' complete statement, now in evidence. It is in connection with that interpretation that the issues may have been broadened beyond the apparent contemplation of the Order.

Thus, early in the hearing the General Counsel took the position that he was not limited to the literal language (i. e., "the four corners") of Travis' statement in establishing the affirmative of issue (1), and that regardless of whether the article on its face constituted an admission of falsity, such admission would appear from an interpretation of

alleged "Aesopian" language or double talk contained in the article, evidence of which he intended to present. Issue (1) is, therefore, to be determined on the following alternative bases:

(a) Whether Travis' article, when read literally, establishes Travis' admission that his affidavit was false.

87 (b) Whether Travis, using recognized Communist techniques, phrased the article in terms of "Aesopian" language and/or double talk, which when interpreted by experts schooled in the use of such language by Communists, established Travis' admission of the falsity of his affidavit.

(a) The situation posed by the first alternative can be simply stated. If the Travis' article contains on its face Travis' admissions of the falsity of his compliance affidavits, then the General Counsel has established, prima facie, the affirmative of the two issues on which the Hearing Officer was directed to receive evidence. Responsive relevant evidence to refute that showing would go only to the questions whether the affidavits are Travis', whether the article is Travis' statement and whether it was published and distributed as Mason testified. Thus, I hold that if Travis' admission in fact appears on the face of the article, when read literally, the awareness of the membership will be established by the publication and distribution of the Article to the members.

(b) Whether or not the article establishes on its face the affirmative of Issue (1), there is no question that the General Counsel has established a prima facie case on that issue by the testimony of experts, Kenneth Eckert and Manning Johnson as to Travis' use of "Aesopian" language and double talk. Without attempting to summarize their testimony, it will suffice at the present stage to find that it establishes prima facie Travis' admission that he had resigned from the Communist Party to make it possible for him to

execute his compliance affidavit filed with the Board, but that he nevertheless continued to believe in the principles of Communism and the Communist party. Furthermore, the testimony of William Mason and Eckert establish prima facie that there has been no change on Travis' part down to the present.

To the extent, however, that the General Counsel relies on the alternative position, now being considered, the evidence requires a negative finding on Issue (2); or at least, it fails to support an affirmative finding on that issue.

Thus Eckert, testifying as to certain Aesopian language in Travis' article, repeatedly stated that while Travis used such language to affirm to Communists and to the "initiate" his continued adherence to the aims and objectives of Communism and the Communist Party (including the overthrow of our Government by force and violence), he deceived by it the membership of the Union, concealing from them and from other readers of the article his true meanings and beliefs. See, for example, the following excerpts from his testimony:

p. 591 My opinion as to the Aesopian language used here is that Travis, while making it clear to the Communists that he is advocating the establishment of a Communist or a Socialist society conceals that to the membership of Mine-Mill and to the readers of this paper, by stating it in this Aesopian style. . . .

p. 592 . . . By phrasing it in this Aesopian language, he is disguising the true aims to the uninitiated, at the same time making it abundantly clear that he, Travis, still subscribes to those beliefs and practices.

p. 627 Hearing Officer: Well, let's see if I can understand you a little better. Is it your view that by that speech Travis was trying to fool the membership in some way?

The Witness: Yes, definitely.

88 p. 628 Hearing Officer: . . . As I understand it, then, although Travis' speech would not fool anyone

experienced in Communist terminology and teachings, it would fool the rank and file membership.

The Witness: Yes, I think that is true, Mr. Examiner. This type of language by Mr. Travis is not intended to fool the Communists. As a matter of fact, a partial reason for using it is to declare to the initiatee his continued adherence to the method by which the Communists are to achieve their objectives.

Hearing Officer: To the extent, then, that there was, within the membership, persons who were familiar with communist terminology and teachings, they would understand the Aesopian language and the double talk, but otherwise not?

The Witness: Yes.

Elsewhere Eckert's testimony was that less than 1% of the Union's membership were members of the Communist Party. (There is no evidence on which a finding can be made as to what further percentage may have been Communist sympathizers, or fellow travelers, or who may have been aware for any reason of the Aesopian sense in which Travis had phrased his statement.)

Eckert's positive testimony that the Travis article in fact received the membership neutralized and overcame other testimony which he and Johnson gave, in response to hypothetical questions, that the membership was none-the-less able to interpret the article as an admission by Travis of the falsity of his affidavits. Indeed, Johnson also testified that it was customary, in devising Communist propaganda, to write so as to convey to Party members and fellow travellers a meaning compatible with the true aims and objectives of the Party, while leading others to accept the language at face value.

More detailed factual findings will be made on this and on other questions at an appropriate stage in this investigation. At the present time and on the present point, it will suffice to state that though the General Counsel has established *prima facie* the affirmative of issue 1, the evidence

does not establish that the membership of the Union was aware of the falsity of Travis' affidavits, but shows to the contrary that Travis concealed from the membership his true meanings and beliefs.

Respondent's motion of May 21, to adjourn the hearings to some 9 or 10 cities throughout the country, was based on the assumed necessity of calling as witnesses large numbers of Union members on the question of awareness of the falsity of Travis' affidavits. That testimony becomes irrelevant and unnecessary in view of the findings which I have made.

Respondent's motion to adjourn the hearing, as made on May 21, is therefore denied; and it is ordered that the hearing be resumed in Washington, D. C., at 10 o'clock, A.M., on June 15, 1954, for the purpose of receiving Respondent's evidence on the following issues on which I find that the General Counsel has established a *prima facie* case:

1. Whether the compliance affidavits are Travis'.
2. Whether the article of August 15, 1949, is Travis' statement.
3. Whether it was published by the Union and distributed to its members.
4. Whether Travis admitted the falsity of his affidavits through the use of Aesopian language and double talk in the article of August 15, 1949.
5. Whether Travis has continued to adhere to the views expressed in said article.

/s/ GEO. A. DOWNING
George A. Downing
Hearing Officer

Dated: June 7, 1954

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APPENDIX B

Travis Statement on Signing Taft-Hartley Law Affidavit

By Maurice Travis
Int'l Secretary-Treasurer

The Executive Board of our International Union has voted to comply with the Taft-Hartley Law. I support this decision.

As most of the membership knows, I have stated, more than once in the last two years, that if it became important to the life of our union to comply with Taft-Hartley, I would support such a step. The reasons which have now made it vital to our Union to comply are the betrayal of labor's fight for repeal of the Taft-Hartley Act by the controlling leadership of both the CIO and the AFL, by the 81st Congress and the Truman Administration—a betrayal which now saddles the labor movement with this law for another two years—and as part of that betrayal, the adoption of raiding, gangsterism and strikebreaking as official policy by reactionaries in the leadership of CIO.

Since the Executive Board meeting at which compliance was voted, I have deliberated very carefully on my course and I have also had the benefit of thorough discussions with my fellow officers, Executive Board members, and members of the Staff. The unanimous opinion of my fellow officers and the others in the International Union is that the most effective way in which I can serve the International Union is by continuing in my post as an officer of the International Union.

Since the interest of the International Union is uppermost in my mind, I have been confronted with the problem of resigning from the Communist Party, of which I have been a member, in order to make it possible for me to sign the Taft-Hartley affidavit. I have decided, with the utmost reluctance and with a great sense of indignation, to take such a step. My resignation has now taken place and as a result, I have signed the affidavit.

This has not been an easy step for me to make. Membership in the Communist Party has always meant to me, as a member and officer of the International Union, that I could be a better trade unionist; it has meant to me a call to greater effort in behalf of the union as a solemn pledge to my fellow members that I would fight for their interests above all other interests.

The very premise of the Taft-Hartley affidavits is a big lie, the same sort of lie that misled the peoples of Germany, Italy and Japan down the road to fascism. It is a big lie to say that a Communist trade unionist owes any higher loyalty than to his union. On the contrary, trade unions are an integral port of a Socialist society, the kind of society in which Communists believe. Therefore, I believe that good Communists are good trade unionists.

The biggest lie of all is to say that the Communist Party teaches or advocates the overthrow of the government by force and violence. If I had believed this to be so I would not have joined the Communist Party. If I had later found it to be so I would never have remained in it. All the slanders by the corrupt press, all the FBI stool pigeons, and all the persecution of Communist workers will not make me believe it is so. I believe that when a majority of the American people see clearly how rotten the foundation of the capitalist system is, they will insist on their right to change it through democratic processes, and all of the reactionary force and violence in the world will be unable to stop them.

90 It is because I believe these things that I have fought the affidavit requirement of Taft-Hartley. I believe it is a blot on American life; I believe under our Bill of Rights, for which our forefathers fought, that an American has as much right to be a Communist as he has to be a Republican, a Democrat, a Jew, a Catholic, or an Elk or a Mason. Free voluntary association is the very cornerstone of the democratic way of life. I have been a Communist because I want what all decent Americans want, a higher standard of living for all the people, the ending

of discrimination against Negroes, Mexican-Americans, and all other minority groups. I want a peaceful America in a peaceful world. Despite my resignation from the Communist Party, I will continue to fight for these goals with all the energy and sincerity at my command.

I am also taking this step because I believe it is one effective means of bringing home, not only to the membership of the International Union but to the people generally, the dastardly and unprecedented requirement that a man yield up his political affiliations in order to make a government service available to the people he represents. This is a dangerously backward step in American political life which threatens all of our democratic institutions. Americans have the right to belong to the political party of their choice and trade union members have the right to choose their own leaders. Denial of these principles undermines democracy and gives comfort to the arrogant reactionaries who seek to put our country on the road to fascism.

At the same time, I want to make it absolutely clear that my opinion continues to be that only a fundamental change in the structure of our society, along the lines implied in the very words of the charter of our International, "Labor produces all wealth—wealth belongs to the producer thereof," can lead to the end of insecurity, discrimination, depressions and the danger of war.

I am convinced that capitalistic greed is responsible for war and its attendant mass destruction and horror. I am convinced it is responsible for depression, unemployment and the mass misery they generate. The present deepening depression, growing unemployment, and threat of war confirm my conviction that the only answer is Socialism.

As a matter of fact, this Socialist concept has always been the guiding principle for American workers. The struggle led by the great Eugene V. Debs, the early fight for the 8-hour work day, the steel and packing struggles led by Bill Foster, the stormy history of the I.W.W. were all influenced by Socialist ideals.

As a member of our International Union I have always been proud of and have drawn strength from its basic Socialist tradition. No other union in this country matches ours in its glorious working-class history. Our union, and its predecessor, the Western Federation of Miners, has carried on some of the most bitter and courageous struggles in the history of the labor movement. I have always been inspired by the fact that early leaders of this union were socialistic in one form or another, that Bill Haywood also took the road to Communism and died not only as a great leader of the working class but as an honored and respected Communist.

Therefore, I want to make it crystal clear that my belief in Communism is consistent with what I believe to be the best interests of the members of this Union and the American people generally and that I am especially happy to be able constantly to remember that it is consistent with the finest traditions of the International Union.

91 I know that sooner or later we will turn this present shameful page in American life, that the reactionary offensive will be beaten back and that the American workers will again resume their march on the road to peace, progress and prosperity. Particularly do I know that the day will come when loyalty oaths and affidavits will be a thing of the past, when the true test will again be service to the people and, for trade union leaders, service to their members.

In the meantime, I am sure that every member of the International Union joins me in my pledge to fight to keep this International Union strong; to bend every effort to make it even stronger, to continue to keep it on a progressive, militant course, and to do everything in my power to make life in our country happy, secure, prosperous and peaceful.

Exhibit "C"

92 Filed Feb. 16, 1955

D-8982

111 NLRB No. 88 Chicago, Ill.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 13-CA-1441

PRECISION SCIENTIFIC COMPANY and INTERNATIONAL UNION OF MINE, MILL AND SMELTER WORKERS, LOCAL 758

DECISION AND ORDER

On October 21, 1953, Trial Examiner Eugene E. Dixon issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had unlawfully refused to bergain with the Charging Union, in violation of Section 8(a)(5) and (1) of the Act, and recommending that it cease and desist therefrom and take certain affirmative action, as more fully set forth in the Intermediate Report, copies of which were duly served upon the parties. Thereafter, the Respondent filed exceptions to the Intermediate Report and a supporting brief, and requested oral argument, and the Charging Union filed a statement in support of the Intermediate Report. In view of the basis for our decision, as set forth hereinafter, the Respondent's request for oral argument is hereby denied.

The Charging Union is an affiliate or constituent unit of International Union of Mine, Mill and Smelter Workers (Independent), hereinafter called the International. On February 1, 1955, the Board issued a Determination and Order,[1] determining that the International was not and had not been in compliance with the filing requirements of Section 9(h) of the Act, and ordering that until the International had complied with such filing requirements, no fur

[1] Maurice E. Travis, Secretary-Treasurer, International Union of Mine, Mill and Smelter Workers (Ind.) and Compliance Status of International Union of Mine, Mill and Smelter Workers (Ind.), 111 NLRB No. 71.

ther benefits under the Act be accorded to the International or to any of its affiliates or constituent units. In view of the foregoing Determination and Order, to promote
93 the objective of national security which underlies the enactment of Section 9(h) of the Act, and to protect the integrity of the Board's processes, we find that it would not effectuate the policies of the Act now to require the Respondent to bargain with the Charging Union. We shall, accordingly, dismiss the complaint without considering the merits of the Trial Examiner's findings, conclusions, and recommendations.

ORDER

IT IS HEREBY ORDERED that the complaint filed herein against Precision Scientific Company, be, and it hereby is, dismissed.

Dated, Washington, D. C.

GUY FARMER, *Chairman*
ABE MURDOCK, *Member*
IVAR H. PETERSON, *Member*
PHILIP RAY RODGERS, *Member*
(SEAL) *National Labor Relations Board*

* * * * * * * * * *

94 Filed Feb. 21, 1955

Order Granting Intervention, Etc.

Now on this day this cause came on to be heard upon the motion of Precision Scientific Company, an Illinois corporation, for leave to intervene herein as a party defendant, and the Court having heard the parties and having considered said motion and the answer tendered therewith, and other papers filed in support and opposition thereto, and it appearing to the Court that the said Precision Scientific Company should be permitted to intervene herein as prayed in said motion, and the Court being duly advised in the premises, it is hereby

ORDERED, that Precision Scientific Company be and it is hereby granted leave to intervene in this cause, and it is hereby made a party defendant to this cause; and it is further

ORDERED, that leave be and the same is hereby granted said intervenor to file instanter as its answer herein, the answer attached to the motion to intervene.

And the Court having examined the complaint, the motion for a preliminary injunction and the affidavit in support of said motion, heretofore filed herein, and finding that said affidavit is improper in form and substance and being of the opinion that the issues involved herein affect the public interest, of its own motion, doth hereby

ORDER, that the affidavit filed in support of the motion for a preliminary injunction be and the same is hereby stricken.

It is further ORDERED that leave be and the same
95 is hereby granted plaintiff to file a new affidavit and to amend its complaint within ten days from this date, that defendants be and they are hereby granted leave to plead to the complaint as amended within twenty days thereafter, and plaintiff be and it is hereby granted leave to reply to defendants' pleadings within twenty days thereafter.

DONE this 21st day of February 1955.

JAMES R. KIRKLAND,
U. S. District Judge

2 **Proceedings**

The Court: May I ask if counsel are present in the case of the International Union of Mine, Mill and Smelter Workers, and especially counsel from out of town who seek to intervene in behalf of it?

Mr. Barnes: May it please Your Honor—

The Court: What company is that?

Mr. Barnes: Precision.

The Court: What is the name of your client?

Mr. Barnes: Precision Scientific.

The Court: And especially counsel from out of town who seek to intervene in behalf of the Precision Instrument Company.

Mr. Barnes: I would like to move, if I may, Your Honor, Mr. B. F. Sears of Chicago, a member of the Illinois Bar, Supreme Court of Illinois and also a member of the Supreme Court of the United States, for admission for trial of this case.

The Court: Mr. Sears, we are very happy to have you and on the motion of your colleague you will be admitted to participate in this case.

Mr. Sears: Thank you, Your Honor.

The Court: Gentlemen, the posture of the case seems to be this: On February 9, 1955, there was filed in this cause a complaint for declaratory judgment and injunctive relief.

The matter was heard before this Court on both
3 the preliminary restraining order and the preliminary injunction and the matter was—preliminary injunction and on February 11, 1955, the Court signed an order to two effects; one, the Court doubted that it had jurisdiction at the moment, and there was no show of irreparable damages, and accordingly it was dismissed.

Counsel, as the Court understands, applied to the Circuit Court of Appeals for the same relief and the matter was continued over until the first of the week. In the meantime on the date of Tuesday, February 15, the case of Guy Farmer, et al., vs. International Fur and Leather Workers Union of the United States and Canada was decided.

That is appended to one of the pleadings in this case.

In the meantime, one of the companies with whom this union has been negotiating looking to a contract has asked to intervene.

I will hear you first on the intervention.

Mr. Sears: May I proceed, Your Honor?

The Court: Yes, indeed, sir.

Mr. Sears: Has Your Honor had an opportunity to read the motion?

The Court: Indeed. I have studied it over the entire weekend. I spent three days on it.

Mr. Sears: Now, then, the question involved in the motion to intervene and the right of the intervenor to intervene is based upon Rule 24(a) and (b) of the Federal Rules of Civil Procedure. And the intervenor claims the right under Rule 24(a) to intervene as a matter of right because the intervenor may or could become bound by a judgment in this proceeding.

If this Court were disposed to enter a final judgment as requested by the plaintiff in this case, there would be a question with respect to the Board's order of February 7 which on the basis of the order sought to be annulled in this case dismissed an unfair labor practice charge against this employer.

This employer is relying upon the determination and order of the Board of February 1, 1955, which is sought to be annulled in this proceeding because that order and that order alone was the predicate for the dismissal of the unfair labor practice charge which was filed by this union against that employer.

We believe that the case of White vs. Douds in 80 Fed. Sup. is pretty decisive with respect to that question.

With respect to the question of intervention under Rule 24(b), which is a permissive intervention, we believe that the allegations of this complaint and the defense interposed in the answer have question in fact in common; namely, whether or not the plaintiff is a labor organization under Section 2(a) of the Taft-Hartley Act, defining the term, a question which, by the way, Your Honor, has never been passed upon by any court, and we believe that when this union invokes the processes of this Court it is subject to the same rules which apply to any litigant which invokes the processes of this Court, and when this union avers in its complaint that all of its officers

have duly filed affidavits pursuant to Section 9(h) of the Taft-Hartley Act, that a defendant who might or could have an interest in the subject matter of that proceeding is entitled to intervene and is entitled to traverse the allegations of that complaint.

The Court: May I ask you, because I am interested in this phase, Were you aware of this case that came down on February 15 from our Circuit Court of Appeals?

Mr. Sears: Yes, Your Honor. I was aware of that on Tuesday afternoon; the afternoon before we filed this motion to intervene.

You are referring to the Fur and Leather Workers Case?

The Court: Yes, sir.

Mr. Sears: Now, then, certainly basic to a consideration of this case is the right of this union to invoke the processes of this Court.

The posture of this case is entirely different than the Fur and Leather Workers Case, entirely different than the U.E. Case, both of which held that the Board did not have power to investigate the truth or falsity of affidavits filed pursuant to Section 9(h).

But the questions which this intervenor is here
5-A seeking to assert were never asserted in those cases.

As a matter of fact, there was a companion case to this one—we have the record here—filed just about a year ago, in which the union sought to enjoin the conduct of the hearing out of which the order of February 1 eventuated.

We came in on a motion to intervene in that case. His Honor, Judge Curran, dismissed the complaint on motion of the Board and then denied our motion to intervene. The union appealed to the Circuit Court of Appeals and we appealed the order denying us leave to intervene so that we would protect our record in the event the Circuit Court of Appeals should reverse the judgment of Judge Curran. But the Circuit Court of Appeals permitted the investigation to continue, and as I read the opinion, denied the relief sought for upon two grounds. Number one, on

general equity principles; and number two, that there had been no irreparable injury shown.

Now, of course, with respect to this motion I take it that under the doctrine of Missouri-Kansas Pipeline Company, referred to in our points and authorities, the question before Your Honor is not whether or not this answer states a defense to the complaint, but the question is what is our standing to intervene. Of course that may be pure metaphysics. It is sometimes difficult to argue the question of a person's standing to intervene without regard to the substance which he asserts a right to intervene.

So that we have, when we filed that companion case, we filed a copy of our brief before the National Labor Relations Board in the unfair labor practice proceeding, which is in the record of that case, which discusses two of the points which we are here seeking to have this Court determine in this proceeding; namely, whether or not the plaintiff is a labor organization within the meaning of Section 25 of the Taft-Hartley Act—and incidentally, with respect to that, you will find in that brief a decision of the Canada Labor Relations Board in 1952, where under a substantially similar statute the Canada Labor Relations Board held that the Canada Seaman's Union, a communist dominated organization, which had been expelled from Canada's similar trade congress, a congress similar to the C.I.O., the C.I.O. have expelled Mine Mill in 1950, the Canada Labor Relations Board held that the Canada Seamans Union was not a labor orgnization within the meaning of the similar act of Canada because its policies and activities were not those of a labor organization, but its policies and activities were dominated and controlled by the Communist Party, a subversive agency dedicated to the overthrow of the United States government by force and violence.

Now, when we consider the posture of this case it seems to me that we are confronted with some very basic law, Your Honor. The question in this case is not whether the

National Labor Relations Board had the power or
7 authority to conduct the investigation out of which
its order eventuated. That is not the sole question in this case. Because the Board in this case conducted that investigation and made that determination.

The issue posed in this case is whether or not this union, as presently constituted, in view of the allegations of the answer, of the applicant for intervention, may invoke the processes of this Court even though the defendants, the members of the National Labor Relations Board, have done this plaintiff a wrong. Because this plaintiff asserts that it is a labor organization, and this plaintiff asserts that it duly complied with the provisions of the Taft-Hartley Act by filing these affidavits. And if these affidavits are in fact false, then this plaintiff is asserting rights under a United States statute which this plaintiff has procured by fraud, perjury, and deceit.

The Court: Mr. Sears, if I can stop you, I think you hit it right on the head. I have been reading this very very carefully.

You will first of all keep in mind that this is a very strategic industry in the United States, it involves the mining of copper.

On last night's radio and television there was a report that some 600,000 Red Communist troops are marching to the borders of China. It may be the prelude of the first
shot in World War No. 3. And what you say im-
8 presses this Court that if this body is here before
us on fraud, is not a labor union in fact, it has no standing in this Court.

Another thing to keep in mind is that this opinion which came down on the 15th of February, 1955, is a bit misleading. On Page 3 it speaks of Ben Gold as having been convicted on one date, to wit, in April of 1954, of filing a false non-communistic affidavit in 1950, and then asserts that affidavits were filed within one month of that, to wit, May 11, 1954, immediately after Gold was re-elected by the union.

This Court can almost take judicial notice that Ben Gold is a communist. The thing the opinion doesn't point out is that the review of that conviction is still pending in the Circuit Court of Appeals and it may well turn out that he had not been convicted in fact.

I think the posture of this case is a little different, because the officers of it, notably the president and the secretary no doubt from the pleadings of this case that they are communists in fact. And I would think from what you have argued to date, if you can demonstrate that, that you have a right to intervene.

I am going to ask the Government first to reply and then I want counsel for the union to reply after that.

Mr. Sears: Do you wish me to proceed or counsel for the Government?

The Court: No, sir. May I ask you preliminarily, do you interpose objections to this petition to intervene in behalf of the National Labor Relations Board?

Mr. Come: Your Honor, the Board is in mid-position on this motion for this reason: We think that the issue in this case as in the Gold Case and in the previous cases is whether the Board—

The Court: Electrical Workers, you mean?

Mr. Come: Yes, sir. It is whether the Board has power under Section 9(h) of the Act to deny the union benefits because of the falsity of the affidavit.

The Court: Are you pitching the whole Government's case on that one point?

Mr. Come: Well, we think that certainly the problem that the company raises is a very serious problem, but the Board, under the National Labor Relations Act, is empowered by Congress to go at that problem only to the extent that Section 9(h) of the Act gives the powers in that respect.

In other words, by denial of Board benefits to the union.

The Court: Suppose the intervenor could demonstrate that this isn't even a labor union. Would the position of

the Board be that you would oppose intervention on behalf of this company?

Mr. Come: With respect to that, and that is the second point I want to come to, is that the Board in its proceeding up to date has been assuming that they are a labor organization for this reason—

The Court: Suppose it turns out they are not.

Mr. Come: Well, let me just explain to you the basis on which the Board reached that conclusion and then I will try to answer that question.

Under Section 25 of the National Labor Relations Act which defines labor organizations for purposes of the Act and for purposes of the Board's functions, it means any organization of any kind or any agency or employee representation, committee or plan in which employees participate, and which exist for the purpose in whole or in part of dealing with employers concerning grievances, labor disputes, wage rates, pay, hours of employment, or conditions of work.

Under that definition this organization could well be an adjunct of the communist party and still meet this definition of in part representing employees for purposes of wages and hours and working conditions.

Secondly, under Section 9(h) of the Act which is the provision which gives rise to the Board's proceeding here, the Board can require non-communist affidavits only of labor organizations or affiliates therewith.

So I say that insofar as the Board proceeding to date is concerned, it has been based on the assumption that they do meet the definition of labor organizations within the meaning of 25.

Now, I might define labor organizations differently for different purposes. But for the purpose that we have here the Board has been assuming that they meet that definition.

Now, should they desire to preserve their contention in that respect, namely, that the Board has erroneously con-

strued the term labor organization, it appears to us that they have a remedy in the Court of Appeals on that by petitions to review the Board's order in the Precision Scientific Case with the Board to reverse its stand and reinstate that case.

An employer has a right under 10(f) of the Act to review a Board's order dismissing or ordering it to bargain with a labor organization. And one of the contentions that it made before the Board was that this was not a labor organization.

So we say, viewing the case that way, it looks like the issues that the company seeks to interject here are not germane to the issue involved here. However, we also—by "we" I mean the Board—realize that this Court as a court of equity has broad powers. And although I do not myself see that the question that the company seeks to raise would be relevant at the stage of final relief where we are here in a suit for declaratory judgment and permanent injunction, that is a question that the Court is free to disagree with me on and therefore on that issue we must defer to the judgment of the Court.

The Court: I rather gather what you are telling
12 the Court is you don't say yes and you don't say no.

Mr. Come: That is correct. As a matter of law—

The Court: Let me hear from the other side, then.

Mr. Rein: First, I think I should clarify and amplify the remarks made by Mr. Comé with regard to the definition of the term labor organization as it appears in in the National Labor Relations Act. That definition is as follows:

"The term labor organization means any organization of any kind or any agency or employee representation committee or plan in which employees participate and which exists for the purpose in whole or in part of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."

I think it is clear that under that definition of labor or-

ganization I think we ought to make it clear that the intervenors answer really does not negate that it is a labor organization; it alleges a labor organization and something or something else. It doesn't negate the fact that it is an organization for the purpose of dealing with employers with respect to wages and hours, in part dealing with employers in respect to wages, hours, and conditions of employment.

The only possibility, the only way in which this case could possibly affect the interest of the Precision Scientific Company, is if this Court grants the relief requested in the complaint, which I think—I will address myself later—must be granted under the rulings of the Court of Appeals for this circuit—a decision for the plaintiff in this case will mean that the plaintiff will like other labor organizations have access to the National Labor Relations Board and to the processes of the National Labor Relations Board. That is all it will mean. It will have no effect whatsoever upon the company.

It is true that if the union is granted access to the National Labor Relations Board, it has pending before the National Labor Relations Board a charge of unfair labor practice against this company, and that it is possible, though the decision of this Court saying that the union can go to the Board will by no means decide that the Board then must decide in favor of the union against the company—that would be a matter for the Board to decide—in that proceeding the Court will have a full opportunity to present any issues it wishes to present—full due process of law, full argument. And in the event the Board decides against them there is a proceduer for review established in the Act itself under Section 10(f) to review an order of the Board in the Circuit Court of Appeals.

The cases have held numerous times that that procedure is exclusive. It is an adequate remedy to any employer against whom an unfair labor practice order would exist, and it is also an exclusive remedy.

In other words, the employer can take no other remedy.

By coming in here and seeking to intervene what the employer in effect is trying to do is trying to evade those cases. It is in effect trying to get an injunction against the Board taking any action and holding a hearing and issuing an unfair practice order against them.

It seems to me the action which the company is trying to take here, is squarely in conflict with the ruling decision in Myers against the Bethlehem Shipbuilding Corporation, which says that under the National Labor Relations Act, anyone who thinks that an order of the Board will affect them, must be confined to the exclusive remedy which is given to them under the National Labor Relations Act, and that is a review subsequent to the order, not prior to the issuance of an order, and no order has yet been issued, but subsequent to the issuance of that order, a review in the appropriate Circuit Court of Appeals.

In addition it has been held in numerous courts, and in this circuit in the Aerovox Case, that the question of a union status with regard to compliance under 9(h) of the Taft-Hartley Act is not an issue which an employer can raise even before the Labor Board, let alone in a court. These were cases in which subsequent to a finding of an unfair labor practice order by the Board, and in the Board proceeding itself, the company attempted to raise the very same issue they are raising here, that the union which had filed the charges in those cases was allegedly communist dominated, communist controlled, had not complied with the Taft-Hartley Act in good faith as the company says here.

In all of those cases the Board refused to hear those arguments, in all of those cases, and they cited on Page 2 of my memorandum, the employer came into court and attempted to raise those issues even on a Section 10(f) proceeding. And the court held that the employer had no standing whatsoever to raise that issue.

The issue of the standing of the union to have initial access to the Labor Relations Board, they said, is a matter solely for the National Labor Relations Board and not for an employer to raise at any stage of the proceeding.

In other words, what the employer is trying to do here is to raise an issue which they can not raise at any stage of the proceeding. I think the cases conclusively show that they have no right to intervene here; there is no interest for them to protect.

I would like to point out further that one of the things to which the employer has addressed himself, which apparently impressed Your Honor, is the fact of the nature and character of this union and whether or not because of that nature and character, which the employer wishes to try before this Court, the union should therefor get access before the National Labor Relations Board.

I would like to indicate to you that that position on the part of the employer indicates not only its belief that the Labor Board is negligent in its duty to the public, but it also takes the position that the Attorney-General is negligent in his duty.

I would like to bring to Your Honor's attention the fact that in the recent Congress, last session, there was passed an Act known as the Communist Control Act of 1954. Under the provisions of that Act a special procedure was set up whereby if in the judgment of the Attorney-General of the United States, and I submit the Attorney-General is a far more appropriate body to make these charges and to bring these considerations than the employer in this case—if in his judgment he believes that any labor organization is to some extent, not even going as far as the employer here says, it doesn't even have to be communist dominated or controlled, but merely communist infiltrated, it is then his duty to set forth and file a proceeding before the Subversive Activities Control Board whereby that issue may be litigated, and upon a finding by the Subversive Activities Control Board that the Attorney-General is correct,

then that union will be denied access to the processes of the National Labor Relations Board.

The Court: I don't know whether I follow your argument. Aren't you arguing yourself out of court? Aren't you telling the Court that if this is a communistic infiltrated union that there is now present machinery for deciding the issue which is raised and if you are not a union in fact you have no standing?

Mr. Rein: I say there is machinery and that machinery can be instituted before the Attorney-General of the United States before the Subversive Activities Control Board; that is correct. That is why that issue cannot be litigated here. The only place where it can be litigated, and until the Attorney-General wishes to institute such a proceeding—

The Court: Do you mean the Court would be powerless in the face of a record which indicates fraud, indicates a lack of standing, that the Court couldn't even entertain an intervenor's answer?

Mr. Rein: I think it is perfectly clear in the decision which came down from the Circuit Court of Appeals last Tuesday that the Labor Board is powerless to conduct the entire proceeding which it conducted, it had no right to investigate the truth or falsity of the affidavit—

The Court: Don't worry about the truth or falsity of the affidavit. What about this general proposition that this is not a union in fact, and what about the proposition that was raised under the pleadings that they are here by fraud, they are not in this Court with clean hands? What about that?

Mr. Rein: I submit that they are a labor organi-
18 tion; they are entitled as a labor organization, and I don't think anybody denies that they are a labor organization, if they are entitled as a labor organization, having filed affidavits under the Taft-Hartley Act, in accordance with the provisions and forms of the Taft-Hartley Act—

The Court: If it turns out the affidavits are false—

Mr. Rein: It does not turn out, but even if it did.

The Court: Why would you say it won't turn out that they are false?

Mr. Rein: No one here—we don't even reach the issue we have in the Gold Case where one individual was convicted of filing a false affidavit.

The Court: The Court was careful this morning to point out that where there is a conviction and an appeal flows, that is not final judgment.

Mr. Rein: But here there isn't even a conviction.

The Court: What say you then as to this—

Mr. Rein: There is less than that—

The Court: What do you have to say to this article in the Trade Unionist in which the principal officer openly states that he was a communist and with great reluctance in 1952, as I recall, resigns, and when the late Senator McCarran conducted his hearing at Utah wouldn't even admit or deny, but claimed his rights under the Fifth Amendment.

Mr. Rein: I should think his rights under the Fifth Amendment have nothing to do with this matter.

The Court: If they point up that he was a communist in fact, that he and all the other officers were likewise—.

Mr. Rein: No, the fact that the man refuses to answer the question. He has filed non-communist affidavits every single year since 1949.

The Court: But if he is in this Court with unclean hands trying to assert on the one hand that he is not a communist and an active one at that.

Mr. Rein: He is not the plaintiff in this case, may I point out; the union is.

The Court: Now we are getting to something I am personally interested in.

I notice in the complaint that was filed in this cause for declaratory judgment and injunctive relief that two attorneys have signed the pleadings—one, Nathan Witt, whom I do not know and who has indicated a New York City address; and you, yourself, who I know is a member

of this Bar, and I believe you have offices at 711 14th Street, N.W.

Mr. Rein: That is correct.

The Court: I notice that in the motion for the preliminary injunction Joseph Forer is joined and did not indicate where he was—

Mr. Rein: He is my partner.

The Court: —where he has his address for business purposes in the District of Columbia.

Mr. Rein: He has the same address that I have.

The Court: Did he ever have offices in the Heirich Building on K Street?

Mr. Rein: No.

The Court: Was he ever involved in the case of in re Kammer?

Mr. Rein: No.

The Court: Did he ever circularize the Grand Jury in an attempt to find out what their feelings were toward communists?

Mr. Rein: No.

The Court: He is not involved in that?

Mr. Rein: No.

The Court: This leads me immediately to what I am concerned with.

In the affidavit in support of motions for preliminary injunction and temporary restraining order I notice that first of all there is no jurat on this motion.

Mr. Rein: On the affidavit?

The Court: Yes, sir. There is nothing averred that the affiant knows the facts to give them any quality as to whether he is swearing under oath. I notice it was apparently executed in New York—in New York City.

The only thing on the alleged jurat is one short sentence that says, "Sworn before me the tenth day of February 1955." Then there is a signature appearing to be Ralph Shapiro, and there is a rubber stamp beneath that that says, "Ralph Shapiro, Notary Public, State of New York, No. 41-89 4,000, qualified in Queens"—I gather that is Queens County, it is not clear—"Certificated

in New York County, Commission Expires March 30, 1956."

And then over on the left there is an impression of a seal which one would normally expect would be a notarial seal. It turns out the seal says "Ralph Shapiro, State of New York, Attorney and Counsellor at Law."

When did an attorney at law ever have a right to impress on a legal document the advertisement that he was an attorney and counsellor at law?

Mr. Rein: I am sorry, I don't know anything about the New York procedure.

The Court: Why isn't the notarial seal on this complaint?

Mr. Rein: May I look at it?

The Court: Yes, indeed. I am a little concerned that first of all a member of the Bar and not an officer of the company undertakes to verify it, and then does that particular type of swearing. I don't know whether that is a trick or what it is. That heightens this Court's view that there is something wrong with this case. There is no way the Court could punish your partner, Mr. Witt for making that alleged affidavit. It doesn't swear to anything. Anyone can put that stamp on there.

Gentlemen, this is what the Court is going to do:

22 Have you finished your argument on the question of the right of this company to intervene?

Mr. Rein: If I may have just a second.

The Court: You may conclude and I am about to rule.

Mr. Rein: Well, finally, I think I was on my last argument, that insofar as any question which the company wishes to raise about the character of the union, my indication was that since there is a procedure set up by congress under the Communist Control Act of 1954, which says that the Attorney-General, if he believes that the union is of such a character as to warrant its being barred from the processes of the Board, it is for the Attorney-General then to file such a proceeding before the Subversive Activities Control Board, and that it is not the position of any employer to file such an action either before the Subversive Activities Control Board or before this Court.

I would like to indicate briefly, I don't know what Your Honor has in mind with regard to the affidavit, but at this stage this case comes before Your Honor on the basis of a record of proceedings which has been filed in this Court by the National Labor Relations Board, which I submit is all we need so far as the facts of the case are concerned, to entitle us to summary judgment under the ruling of the Court of Appeals in the International Fur and Leather Workers Case against Farmer.

The Court: It is the ruling of the Court that the
23 complaint is not in due and proper form. There is no jurat sufficient in law to hold the one who allegedly would swear to its contents guilty of a charge of perjury. Whether this is an inadvertance or a trick by attesting an affidavit with a facsimile impression of a seal of something this Court in all its practice never heard of and never knew any lawyer in the District of Columbia to do, to impress on an alleged jurat an advertisement that a man who is a notary public is also an attorney at law, it is quite obvious that this is not sufficient under the law, and of the Court's own motion the Court is striking this affidavit; will allow counsel for the plaintiff 10 days to file an amended complaint in due and proper form. And the Court wants someone who has personal knowledge of these facts—it should be an officer of this particular plaintiff.

I don't think a member of the Bar in a dual capacity as an advocate should also be a witness. If that is the status in which he appears, and if he is going to appear as a witness, I don't think he should appear as an attorney.

The Court is convinced at this stage of this case that there is a right to intervene on behalf of the Precision Scientific Company, an Illinois corporation, and will grant them leave to intervene after an appropriate and proper amended complaint is filed.

How much time does the Government want to an-
24 swer?

Mr. Rein: May I be heard first?

The Court: Just a minute, sir.

Mr. Come: The Government can answer within 5 days.

The Court: I will give you more time than that because I want it done carefully, and if the facts as alleged make out a matter properly before the Court I want it spelled out, and if they don't I want it handled in an appropriate way that will be dispositive of the entire matter. So, how much time will you actually need for careful pleading?

Mr. Come: Say 20 days, Your Honor.

The Court: Very well. I will give you 20 days.

How much time do you need?

Mr. Rein: Now may I point out in the affidavit—

The Court: How much time do you need?

Mr. Rein: I don't know for what. The affidavit is not part of the complaint.

The Court: The Court thinks it is, and thinks especially in view of the position taken by the Precision Company that the plaintiff is not in here with clean hands. There is something unusual about this case and we are going to find out about it.

How much time do you need from the filing of the intervenor's answer?

Mr. Rein: I don't know for what.

The Court: Anything you want; to strike, answer; anything you plead.

Mr. Rein: I won't need any time at all.

The Court: I don't understand you. If you are going to file an amended complaint within 10 days, it depends on your industry, how soon you get it in, by the order of the Court this answer goes in—the Government wants 20 days and I have granted it. How much time do you want?

Mr. Rein: Well, I won't need any time for anything at that point.

The Court: Make up your mind, sir. If you don't need any time, there is 20 days for the Government to answer. I will give you the same.

All right, let that be the order of the Court.

. . . . . .

102 Filed Feb. 21, 1955

Intervener's Answer

1. Intervener denies the allegations in paragraph 1 of the complaint.

2. Intervener denies that plaintiff is a labor organization within the meaning of section 2(5) of the Taft-Hartley Act, but on the contrary avers that plaintiff is an unincorporated organization or association which purports to be a labor organization, but which is in fact a subversive organization or association whose policies and activities are consistently directed toward the achievement of the program and purposes of the Communist Party, rather than the lawful objectives of a bona fide labor organization.

3. That the Communist Party is an organization engaged in an international conspiracy to overthrow existing non-Communist governments by force or violence or other unlawful or illegal means; that every member of said Communist Party is an agent for the purpose of achieving and promoting the aims, purposes, and policies of the Communist Party; that one of the means of the Communist Party to achieve the overthrow of the United States Government by force or violence or other unlawful or illegal means is to infiltrate labor unions and thereby gain control of the productive facilities of the country, and by political strikes and other devices so harass, disrupt,
103 and destroy business as to promote the Communist purpose of the overthrow of the United States Government by the means aforesaid.

4. That the preamble of plaintiff's alleged constitution reads as follows:—

"One, we hold that there is a class struggle in society and that this struggle is caused by economic conditions.

Two, we affirm the economic conditions of the producer to be he is exploited by the wealth he produces being allowed to retain barely sufficient for his elementary necessities.

Three, we hold the class struggle will continue until the producer is recognized as the sole master of his product.

Four, we assert that the working class alone must achieve its emancipation.

Five, we hold that an industrial union and a concerted political action of wage earners is the only way of attaining this end.

Six, an injury to one is an injury to all.

Seven, therefore, we, the wage workers employed in and around the mines, mills and smelters, refineries, tunnels, aqueducts, subways, open pits, open cuts, dredges, power shovels, excavators, drag lines, processing, chemical and reduction plants of the United States, its territories, Canada and the rest of the Western Hemisphere unite under the following Constitution."

5. The plaintiff, prior to 1950, was affiliated with the Congress of Industrial Organizations, a trade union congress, hereinafter referred to as the C.I.O.; that the C.I.O. is governed by a constitution and under Article VI of said constitution, the Executive Board of the C.I.O. is empowered, by two-thirds votes, to revoke the certificate of affiliation or to expel any international union, the policies and activities of which are consistently directed toward the achievement of the program or purpose of the Communist Party, any Fascist organization, or to the totalitarian movement; rather than the objectives and policies, set forth in the constitution of the C.I.O.

6. That on November 5th, 1949, pursuant to said Article VI of the C.I.O. constitution, charges were filed against plaintiff requesting the Executive Board to expel plaintiff from the C.I.O. on the grounds that the policies and activities of plaintiff were consistently directed toward the achievement of the program or the purposes of the Communist Party; that the Executive Board of the C.I.O. authorized the President of the C.I.O. to appoint a com-

mittee to hear the charges and report to the Executive Board. That a Committee was duly appointed to hear said charges, du notice of filing of the charges was given to plaintiff on November 7th, 1949, notice of the committee hearings was given plaintiff on December 14th, 1949, hearings were continued upon request of plaintiff until January 18th, 1950, and plaintiff requested permission for twenty witnesses to attend the hearings which request was granted.

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7. Said Committee's hearings began on January 18th, 1950, and continued through January 19th, 1950; that at said hearings the Director of Education and Research of the C.I.O. compared the policies and activities of the International Union with the program of the Communist Party; that two witnesses, both former members of the Executive Board of plaintiff testified at said hearings in detail as to the manner in which the program of the Communist Party was transplanted into the policy of the plaintiff International Union. Said hearings were continued to February 6th, 1950, at the request of plaintiff at which time plaintiff offered no testimony to deny or rebut the testimony previously given, at which time the hearings were concluded and the Committee filed its report which report contained the following conclusion and recommendations:

"For the reasons stated, therefore, and on the basis of all the evidence presented to it, the committee unanimously concludes that the policies and activities of Mine, Mill are consistently directed toward the achievement of the program and the purposes of the Communist Party rather than the objectives and policies set forth in the C.I.O. constitution. The committee recommends that the executive board exercise the powers granted to it by article VI, section 10, of the C.I.O. constitution and, by virtue of those powers, revoke the certificate of affiliation heretofore granted to the Mine, Mill and Smelter Workers and expel it from the C.I.O."

8. That the report of said Committee was submitted to the Executive Board of the C.I.O. in the middle of February 1950; that said report was discussed at said Executive Board meeting; that representatives of plaintiff were present at said meeting and there presented their case and argued against the report of the Committee, but presented no evidence to deny or rebut said charges. That thereafter and in February 1950 the Executive Board of the
105 C.I.O. voted to revoke the certificate of affiliation of plaintiff and plaintiff was suspended from the C.I.O.; that plaintiff failed and refused to appeal said revocation of their certificate of affiliation to the 1950 convention of the C.I.O. pursuant to the constitution of the C.I.O.; that the report of the C.I.O. committee is contained in pages 97 to 109 of Senate Document 89 of the Eighty-Second Congress, 1st Session.

9. That on October 6th, 7th, 8th and 9th, 1952, the Subcommittee to investigate the administration of the Federal Security Act and other internal security laws of the Committee on the Judiciary of the United States Senate, a duly authorized committee of the United States Senate appointed by the Eighty-Second Congress, Second Session, held hearings in Salt Lake City, Utah, respecting the Communist affiliation of the principal officers of plaintiff; that at the conclusion of said Subcommittee hearings the said Subcommittee prepared and filed a Report, a copy of which is attached hereto, marked Exhibit A, and made a part hereof. Said record of the testimony adduced at said hearing consists of three hundred printed pages. The report and the record of the testimony is bound in one document entitled "Communist Domination of Union Officials In Vital Defense Industry—International Union of Mine, Mill, and Smelter Workers", which bears United States Government Printing Office number 25258, and is dated Washington, 1952. It is incorporated herein by reference and the court is respectfully requested to take judicial notice of its contents.

10. That in the latter part of October, 1952, there appeared posted on the Union bulletin board in intervener's plant in Chicago, Illinois, a letter on the letterhead of plaintiff, dated October 20th, 1952, addressed to one Edward De Clair, an employee of intervener and Vice-President of Local 758 of said plaintiff, signed by John Clark, as President of plaintiff, which read as follows:—

"October 20th, 1952

Dear Brother De Clair:

I wish to acknowledge with deep appreciation the message of support you sent to us in Salt Lake City at the time we appeared before the McCarran Committee.

106 Our ability to defeat the efforts of McCarran to destroy our Union depends upon the rank and file of our Union and expressions such as yours indicate that we will defeat our enemies.

Sincerely and fraternally yours,

/s/ JOHN CLARK
John Clark, President"

11. That prior to August 15th, 1949, Maurice Travis, then and now Secretary-Treasurer of plaintiff, wrote or caused to be written for him a certain statement or article and thereafter published or caused to be published the said statement or article in the *Union*, the official publication of plaintiff on August 15th, 1949; that said statement or article was circulated among all the members of plaintiff and members of the general public; that said statement or article read as follows:—

"The Executive Board of our International Union has voted to comply with the Taft-Hartley law. I support this decision.

As most of the membership knows, I have stated, more than once in the last two years, that if it became important to the life of our Union to comply with Taft-Hartley, I would

support such a step. The reasons which have now made it vital to our Union to comply are the betrayal of labor's fight for repeal of the Taft-Hartley Act by the controlling leadership of both the C.I.O. AND THE A.F.L., by the 81st Congress and the Truman Administration—a betrayal which now saddles the labor management with this law for another two years—and as part of that betrayal, the adoption of raiding, gangsterism and strike-breaking as official policy by reactionaries in the leadership of C.I.O.

Since the Executive Board meeting at which compliance was voted, I have deliberated very carefully on my course and I have also had the benefit of thorough discussions with my fellow officers, Executive Board members, and members of the Staff. The unanimous opinion of my fellow officers and the others in the International Union is that the most effective way in which I can serve the International Union is by continuing in my post as an officer in the International Union.

Since the interest of the International Union is uppermost in my mind, I have been confronted with the problem of resigning from the Communist party, of which I have been a member, to make it possible for me to sign the Taft-Hartley affidavit. I have decided with the utmost reluctance and with a great sense of indignation, to take such a step.

My resignation has now taken place, and, as a result,
107 I have signed the affidavit.

This has not been an easy step for me to take. Membership in the Communist party has always meant that, as a member and official of the International Union, I could be a better trade-unionist; it has meant to me a call to greater effort in behalf of the Union as a solemn pledge to my fellow members that I would fight for their interests above all other interests.

The very premise of the Taft-Hartley affidavit is a big lie, the same sort of lie that misled the peoples of Germany,

Italy and Japan down the road to fascism. It is a big lie to say that a Communist trade unionist owes any higher loyalty than to his union. On the contrary, trade unions are an integral part of a Socialist society, the kind of society in which Communists believe. Therefore, I believe that good Communists are good trade unionists.

The biggest lie of all is to say that the Communist Party teaches or advocates the overthrow of the government by force and violence. If I had believed this to be so I would not have joined the Communist Party. If I had later found it to be so I would never have remained in it. All the slanders by the corrupt press, all the FBI stool pigeons, and all the persecution of Communist workers will not make me believe it is so. I believe that when the majority of the American people see clearly how rotten the foundation of the capitalist system is, they will insist on their rights to change it through Democratic processes, and all of the reactionary force and violence in the world will be unable to stop them.

It is because I believe these things that I have fought the affidavit requirement of Taft-Hartley. I believe it is a blot on American life; I believe under our Bill of Rights, for which our forefather's fought, that an American has as much right to be a Communist as he has to be a Republican, a Democrat, a Jew, a Catholic, or an Elk or a Mason. Free voluntary association is the very cornerstone of the Democratic way of life. I have been a Communist because I want what all decent Americans want, a higher standard of living for all people, the ending of discrimination against Negroes. Mexican-Americans, and all other minority groups. I want a peaceful America in a peaceful world. Despite my resignation from the Communist Party, I will continue to fight for these goals with all the energy and sincerity at my command.

I am also taking this step because I believe it is the one effective means of bringing home, not only to the membership of the International Union but to the people generally, the dastardly and unprecedented requirement that a man yield up his political affiliations in order to make a government service available to the people he represents. This is a dangerously backward step in American political life which threatens all of our democratic institutions. Americans have the right to belong to the political party of their choice and trade union members have the right to choose their own leaders. Denial of these principles undermines democracy and gives comfort to the arrogant reactionaries who seek to put our country on the road to fascism.

108 At the same time, I want to make it absolutely clear that my opinion continues to be that only a fundamental change in the structure of our society, along the lines implied in the very words of the charter of our International, 'Labor produces all wealth—wealth belongs to the producer thereof,' can lead to the end of insecurity, discrimination, depressions and the danger of war.

I am convinced that capitalistic greed is responsible for war and its attendant mass destruction and horror. I am convinced it is responsible for depressions, unemployment and the mass misery they generate. The present deepening depression, growing unemployment and the threat of war confirm my conviction that the only answer is Socialism.

As a matter of fact, this Socialist concept has always been the guiding principle for American workers. The struggle led by the great Eugene V. Debs, the early fight for the 8-hour work day, the steel and packing struggles, led by Bill Foster, the stormy history of the IWW were all influenced by Socialist ideals.

As a member of our International Union I have always been proud of and have drawn strength from its basic,

Socialist tradition. No other union in this country matches ours in its glorious working-class history. Our union, and its predecessor, the Western Federation of Miners, has carried on some of the most bitter and courageous struggles in the history of the labor movement. I have always been inspired by the fact that early leaders of this union were Socialistic in one form or another, that Bill Haywood also took the road to Communism and died not only as a great leader of the working class but as an honored and respected Communist.

Therefore, I want to make it crystal clear that my belief in Communism is consistent with what I believe to be the best interests of the members of this Union and the American people generally, and that I am especially happy to be able constantly to remember that it is consistent with the finest traditions of the International Union.

I know that sooner or later we will turn this present shameful page in American life, that the reactionary offensive will be beaten back and that the American workers will again resume their march on the road to peace, progress and prosperity. Particularly do I know that the day will come when loyalty oaths and affidavits will be a thing of the past, when the true test will again be service to the people and for trade union leaders, service to their members.

In the meantime, I am sure that every member of the International Union joins me in my pledge to fight to keep this International Union strong, to bend every effort to make it stronger, to continue to keep it on a progressive, militant course, and to do everything in my power to make life in our country happy, secure, prosperous and peaceful."

12. That the following named persons are the duly elected officers of the plaintiff, and occupy the offices in
109 plaintiff set forth opposite their names:—

John Clark	President	
Orville Larson	Vice President	
Charles H. Wilson	Vice President	
M. E. Travis	Secretary-Treasurer	
William Mason	Board Member, District	1
C. D. Smothermon	" " "	2
Raymond Dennis	" " "	3
Alton Lawrence	" " "	5
Albert Pezzati	" " "	6
C. J. Powers	" " "	7
Nels Thibault	" " "	8

Each of them is now and has been for more than five years immediately last past members of said Communist Party.

13. Intervener admits paragraphs 3 and 4 of the complaint.

14. Intervener denies that beginning in or about August, 1949, or at any time prior or subsequent thereto, each of the officers of plaintiff duly filed with Board (N.L.R.B.), the affidavits required by Section 9(h) of the Taft-Hartley Act, but on the contrary avers, that, by reason of the premises, reference being had to paragraphs 2 to 12 inclusive and 16, hereof, each and every of all of the affidavits filed with said Board by the officers of said plaintiff were and are false and untrue.

15. Intervener denies that plaintiff ever became eligible to avail itself of the processes of the Board, but, on the contrary avers, by reason of the premises, reference being had to paragraphs 2 to 12 inclusive and 14 and 16, hereof, said plaintiff deceived and worked a fraud upon the Board and abused its processes in procuring whatever compliance status it has enjoyed.

16. Intervener admits paragraphs 7 and 8 of said complaint and attaches hereto as Exhibit "B" and incorporates herein the Board's Determination and Order of February 1, 1955 and avers that the facts as therein found are true and hereby tenders and will produce upon the hearing

hereof the record upon which said Determination and Order is based. Intervener avers that based upon said Determination and Order the said Board, on February 7, 1955, dismissed the complaint filed in cause number 13-CA-1441, (See Determination and Order, p. 1) against intervener, a copy of which Decision and Order is hereto attached and marked Exhibit "C" and incorporated herein.

110 17. Intervener denies each and every of the allegations of paragraph 9 of said complaint and each subparagraph thereof.

18. As to the allegations of paragraph 10 of said complaint intervener denies that plaintiff is suffering irreparable injury and avers, by reason of the premises, reference being had to paragraphs 2 to 12 and 14 to 16, inclusive hereof, plaintiff has no right to avail itself of the processes of said Board and employees and citizens of this Nation have no right to select, as their bargaining representatives, an organization of the character of plaintiff as averred herein. Plaintiff's existence and its masquerade as a labor union within the borders of any State in this Nation, is a threat and menace to the internal security of said State and Nation. Plaintiff is a notoriously Communist dominated union. It is an agency of the Communist Party, a conspiratorial and revolutionary junta, organized to reach ends and use methods incompatible with our constitutional system.

19. Plaintiff denies each and every of the allegations of paragraph 11 of said complaint.

SECOND DEFENSE

By reason of the premises, reference being had to paragraphs 2 to 12 inclusive, and paragraphs 14, 15, 16 and 18 hereof, plaintiff is an illegal and subversive organization and its existence within the borders of a State of this Nation ostensibly for the purposes of collective bargaining or otherwise violates the Smith Act (18 U.S.C.A. 2385)

and impairs and is violative of the Federal guaranty to the States contained in Article IV Section 4 of the Constitution of the United States.

Third Defense

By reason of the premises, reference being had to paragraphs 2 to 12, inclusive, and paragraphs 14, 15, 16 and 18 hereof, plaintiff is not in this Honorable Court with clean hands.

Barnabas F. Sears
One North La Salle Street
Chicago 2, Illinois

James M. Barnes
1025 Connecticut Avenue, N.W.
Washington 6, D. C.
Attorneys for Intervenor

113 In United States Court of Appeals for the District of Columbia Circuit

No. 12573

INTERNATIONAL UNION OF MINE, MILL AND SMELTER WORKERS, APPELLANT

v.

GUY FARMER, ET AL., AS MEMBERS OF THE NATIONAL LABOR RELATIONS BOARD, APPELLEES, AND PRECISION SCIENTIFIC COMPANY, AN ILLINOIS COMPANY, INTERVENOR

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Opinion, per curiam

Decided November 10, 1955

Mr. Nathan Witt, of the bar of the Court of Appeals of New York, pro hac vice, by special leave of Court, with whom Messrs. David Rein and Joseph Forer were on the brief, for appellant.

Mr. Norton J. Come, Attorney, National Labor Relations Board, of the bar of the Supreme Court of Illinois, pro hac vice, by special leave of Court, with whom Messrs. Marcel Mallet-Prevost, Assistant General Counsel, National Labor Relations Board, and Robert G. Johnson, Attorney, National Labor Relations Board, were on the brief, for appellees.

Mr. Barnabas F. Sears, of the bar of the Supreme Court of Illinois, pro hac vice, by special leave of Court, with whom
114 Mr. James M. Barnes was on the brief, for intervenor. Mr. Thurman Hill also entered an appearance for intervenor.

Before EDGERTON, Chief Judge, and WASHINGTON and BASTIAN, Circuit Judges

PER CURIAM: The District Court's order, entered February 11, 1955, is reversed on the authority of Farmer v. International Fur & Leather Workers Union, U.S. App. D. C., 221 F. 2d 862, decided February 15, 1955.

Reversed.

115 In United States Court of Appeals for the District of Columbia Circuit

October Term, 1955

No. 12573

INTERNATIONAL UNION OF MINE, MILL AND SMELTER WORKERS, APPELLANT

v.

GUY FARMER, ET AL., AS MEMBERS OF THE NATIONAL LABOR RELATIONS BOARD, APPELLEES; PRECISION SCIENTIFIC COMPANY, AN ILLINOIS COMPANY, INTERVENOR

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before EDGERTON, Chief Judge, and WASHINGTON and BASTIAN, Circuit Judges

Judgment

November 10, 1955

[File endorsement omitted.]

This cause came on to be heard on the record from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, It is ordered and adjudged by this Court that the order of the said District Court appealed from in this cause be, and the same is hereby, reversed, and that this cause be, and the same is hereby, remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court.

Dated November 10, 1955.
Amended 3–15–56.

PER CURIAM.

116 In United States Court of Appeals for the District of Columbia Circuit

Motion for Issuance of Mandate and for Other Action to Effectuate Judgment of the Court

Filed February 27, 1956

[Title omitted.]

[File endorsement omitted.]

The appellant, by its attorneys, moves that the Court issue its formal mandate and that it take other appropriate action to effectuate its judgment in the case. Appellant respectfully suggests that such other action should consist of an express direction that the District Court issue a preliminary injunction in favor of appellant, to be in the form of that agreed upon by the appellant and the members of the National Labor Relations Board, appellees, which form is attached hereto as Appendix A; and that such direction be incorporated in an order supplementary to judgment, or by expansion of the judgment, or by inclusion in the formal mandate, or by whatever other course may appear appropriate.

The grounds of this motion are that the District Court has refused to give effect to the judgment of this Court. The circumstances are as follows:

1. On November 10, 1955, this Court entered its decision reversing the order of the District Court which had denied
117 appellant's motion for a preliminary injunction. The decision of this Court was made per curiam, by Chief Judge Edgerton and Circuit Judges Washington and Bastian, on the authority of Farmer v. International Fur & Leather Workers Union, 221 F. 2d 862, decided by this Court on February 17, 1955.

2. When the Court decided this case, it had before it the record of all the proceedings which had transpired in the District Court up to that time, including not only the denial of the preliminary injunction, but the subsequent proceeding on the application for intervention in the District Court of Precision Scientific Company. This Court allowed Precision to intervene before it. Counsel for Precision filed a brief and participated in the oral argument before this Court. Both counsel for the Board and counsel for Precision sought to distinguish the Fur and Leather case on the basis of issues injected in the case by Precision, which, they argued, warranted denial of a preliminary injunction.

3. On December 9, 1955, there was filed and docketed in the District Court the certified copy of this Court's judgment and opinion, transmitted in lieu of a formal mandate.

4. Since a reversal of an order denying a preliminary injunction obviously requires the granting of a preliminary injunction,

counsel for appellant, soon after December 9, 1955, served on the other parties and submitted to the District Court a proposed preliminary injunction to carry out the judgment of this Court. The proposed order was patterned after the preliminary injunction sustained by this Court in the Fur and Leather case. At the request of counsel for the intervenor, Precision, Judge Kirkland set a hearing for January 13, 1956, to consider objections to the proposed order. Prior to the hearing, Precision filed a memorandum objecting to the issuance of a preliminary injunction on grounds identical with those which Precision had raised in its brief and oral argument before this Court.

5. The proposed preliminary injunction would, of course
118 have enjoined only the members of the National Labor Relations Board from keeping in effect pendente lite the Board's decompliance order. At the hearing on January 13, 1956, before Judge Kirkland, counsel for the members of the Board raised an objection to one phrase of the order and asked that the new members of the Board be substituted. Counsel for appellant readily agreed to delete the phrase objected to and also agreed to the substitution requested. (Tr. 7. 15B. 26–7.*) Counsel for the Board, in agreement with counsel for appellant, also informed Judge Kirkland that the Board had no other objections to the proposed preliminary injunction; that this Court had had before it the entire record of the proceedings before the District Court, including the proceedings on the intervention; that the Board did not join in Precision's objections; and that the Board felt that this Court had intended to decide all the legal issues involved, including those interjected by Precision (Tr. 14–15B). Counsel for the Board also stated that the Board felt that the decision of this Court had disposed of all legal and factual issues in this case (Tr. 30). Appendix A hereto is the proposed order as agreed to by appellant and the Board.

6. At the hearing on January 13, 1956, counsel for Precision then orally raised the same objections to issuance of a preliminary injunction which he had made in his brief and oral argument before this Court (Tr. 15B–20).

7. Prior to the hearing of January 13, 1956, there had been no further proceedings in the District Court which had not been in the record before this Court and of which this Court was not fully aware. There was not, and there still is not, any difference or dispute as to the relevant facts—namely, that, as shown by the record of the proceedings before the Board which were filed
119 in the District Court by the Board and which were in the record before this Court, the Board had cancelled the com-

*Tr. references are to the transcript of the hearing of January 13, 1956, which transcript is being lodged with the Court along with this motion.

pliance status of the appellant on the Board's finding that certain 9 (h) affidavits of an officer of appellant were false to the knowledge of appellant.

8. Nevertheless, the District Court refused to enter a preliminary injunction. Instead, it entered an order that the District Court judgment, which had been reversed by this Court, "is hereby reversed and held for naught, and the case is hereby restored to the nonjury calendar for the trial of issues not covered by the said Mandate." A copy of the order entered by the District Court is attached hereto as Appendix B. Parenthetically, it may be observed that this case has never been on the trial calendar and still is not, for the reason that the Board has not filed an answer and the pleadings are therefore not closed.

9. The reasons given by the District Court for its action appear at Tr. 30–57. We are unable to summarize them, but it appears that the reasons are much along the same lines of the District Court's ruling and order in the intervention proceeding, which were before this Court when it made its decision.

10. As matters now stand, this Court has decided that the appellant is entitled to the relief of a preliminary injunction. On the same record, and in conflict with this Court's judgment, the District Court has failed and refused to give appellant such relief. And this though the parties enjoined, who together with appellant are the only proper parties in the case, agree with appellant that such relief is required by this Court's decision and agree with appellant on the substance and form of the order which the District Court should sign to carry into effect this Court's decision and order. It is apparent that the judgment of this Court will
120 not be effectuated and the appellant will not obtain the relief to which it is entitled unless this Court expressly directs issuance of the preliminary injunction.

Respectfully submitted.

Joseph Forer,
Joseph Forer,
David Rein,
David Rein,
Attorneys for Appellant.

121 *Appendix A to motion*

Proposed order pursuant to judgment of United States Court of Appeals for the District of Columbia Circuit

[Title omitted.]

There having been transmitted to the Court a copy of the opinion and a certified copy of the judgment of the United States Court of Appeals for the District of Columbia Circuit, No. 12573,

decided November 10, 1955, reversing the order of this Court entered on February 11, 1955, which denied the plaintiff's motion for a preliminary injunction, it is by the Court this _____ day of _____, 1955,

Ordered, that the defendants, Boyd Leedom, Abe Murdock, Ivar H. Peterson, Philip Ray Rodgers, and Stephen S. Bean, members of the National Labor Relations Board, their officers, agents, servants, employees, attorneys, successors in office, and all persons in active concert or participation with them be, and they hereby are, enjoined, pending disposition of this cause, from:

1. Keeping in effect (a) the Determination and Order of the National Labor Relations Board, issued on February 1, 1955, and described in the complaint, which declared the plaintiff out of compliance with section 9 (h) of the National Labor Relations Act, as amended, and (b) any actions heretofore taken pursuant to, or to effectuate, said Determination and Order.

122 2. Refusing, by virtue of, or on the basis of, said Determination and Order, to conduct elections, to issue certifications, to process charges of unfair labor practices, to extend to the plaintiff any of the benefits of the National Labor Relations Act, as amended, or to allow the plaintiff access to the Board's processes;

3. Suspending, restricting, revoking, or threatening to revoke plaintiff's compliance status under section 9 (h) of the Act, or otherwise taking or refusing to take any action, by virtue of said Determination and Order.

It is further ordered, that the Findings, Conclusions and Order entered herein on February 11, 1955, denying the plaintiff's motion for a preliminary injunction, be, and they hereby are, vacated.

_____,

Judge.

123 *Appendix B to Motion*

In United States District Court

Order

January 13, 1956

[Title omitted.]

Pursuant to the Mandate of the Circuit Court of Appeals for the District of Columbia Circuit, dated November 10, 1955, and received December 9, 1955, and upon consideration of different orders covering the Mandate presented by opposing counsel, and after argument of counsel, it is by the Court this 13th day of January 1956, ordered:

That in accordance with said Mandate the judgment heretofore entered on February 11, 1955, denying a preliminary injunction,

be and the same is hereby reversed and held for naught, and the case is hereby restored to the nonjury calendar for the trial of issues not covered by the said Mandate.

———— ————,

Judge.

124 In United States Court of Appeals for the District of Columbia Circuit

No. 12573

INTERNATIONAL UNION OF MINE, MILL AND SMELTER WORKERS, APPELLANT

v.

GUY F. FARMER, ET AL., AS MEMBERS OF THE NATIONAL LABOR RELATIONS BOARD, APPELLEES; PRECISION SCIENTIFIC COMPANY, INTERVENOR

Before EDGERTON, Chief Judge, and WASHINGTON and BASTIAN, Circuit Judges

Order amending the judgment

March 15, 1956

[File endorsement omitted.]

Whereas appellant's motion filed herein February 27, 1956, for issuance of a mandate by this Court in this case and for other action to effectuate the judgment of this Court entered herein November 10, 1955, duly came on for hearing before this Court and was argued by counsel; and

Whereas it appears from said motion filed in this Court February 27, 1956, and from the transcript of the proceedings before the District Court on January 13, 1956, that pursuant to said judgment of this Court entered November 10, 1955, this appellant submitted to the District Court a proposed order for a preliminary injunction to carry out the judgment of this Court but that after a hearing thereon the District Court refused to enter a preliminary injunction but instead on January 13, 1956, ordered the case "restored to the non-jury calendar for the trial of issues not covered by" the judgment of this Court; and

Whereas said motion filed in this Court on February 27, 1956, may be treated by this Court as the equivalent of the taking of an appeal from the order of January 13, 1956, in so far as that order refuses a preliminary injunction, thus giving this Court

125 jurisdiction to review the refusal of the District Court to issue a preliminary injunction in this case [See Gerringer v. United States, 93 U. S. App. D. C. 403, 213 F. 2d 346 (1954); West v. United States, 94 U. S. App. D. C. 46, 222 F. 2d 774 (1954); R. F. C. v. Prudence Group, 311 U. S. 579 (1941); Lemke v. United States, 346 U. S. 325 (1953)]; or may be treated as a petition for writ of mandamus to compel the District Court to issue a preliminary injunction in this case; or may be treated as a motion to modify the judgment of this Court entered herein November 10, 1955; and

Whereas in the consideration of this appeal prior to the rendition of its opinion and judgment on November 10, 1955, this Court had before it sufficient material in the record from which it could and did conclude:

(1) that the contention that the appellant lacks "clean hands" was not a sufficient reason for the denial of a preliminary injunction in this case;

(2) that the District Court failed to reconsider its order on appeal herein in the light of the decision of this Court in Farmer v. International Fur and Leather Workers Union, 95 U. S. App. D. C. 308, 222 F. 2d 862, decided February 15, 1955, four days after the entry of the order of the District Court on appeal herein;

(3) that the contention that the appellant was not "a labor union" within the meaning of § 2 (5) of the National Labor Relations Act, 1947, was frivolous and did not constitute a reason for the denial of a preliminary injunction in this case; and

(4) that the contention that the affidavit in support of appellant's request for a preliminary injunction was improperly executed or was inadequate in any material respect would appear unsupported in the circumstances of this case;

126 Now, therefore, the Court having duly considered the foregoing matters, and no suggestion having been made by appellees that any reason exists for the denial of a preliminary injunction other than as reflected in the contentions enumerated above, or that circumstances have in the interim changed in any material respect, and the Court being of the view that the end result, namely, requiring the issuance of a preliminary injunction, would be the same whether the motion filed herein February 27, 1956, be treated as the equivalent of the taking of an appeal or as a petition for writ of mandamus, or for amendment of our judgment of November 10, 1956, we conclude that "to secure the just, speedy, and inexpensive determination" of this action (Rule 1, Federal Rules of Civil Procedure), justice will be best subserved by amending our judgment entered November 10, 1955, so as to require the District Court to issue a preliminary injunction as we intended, and as was issued by the District Court in Farmer v. International

Fur and Leather Workers Union, which ruling this Court affirmed and which we relied on in our opinion of November 10, 1955, in this case.

Accordingly, it is ordered by the Court that the last paragraph of the judgment of this Court entered herein November 10, 1955, be, and it is hereby, amended by striking out the words "for further proceedings not inconsistent with the opinion of this Court" and inserting in lieu thereof the words "with directions to issue a preliminary injunction".

It is further ordered by the Court that the certified copy of the judgment of this Court dated November 10, 1955, in this case which issued to the District Court on December 9, 1955, be, and it is hereby, recalled.

It is further ordered by the Court that the Clerk be, and he is hereby, directed to issue a mandate to the District Court in this case on March 28, 1956.

PER CURIAM.

Dated: March 15, 1956.

127 *Motion to substitute* [omitted in printing]

128 Omitted.

129 In United States Court of Appeals for the District of Columbia Circuit

[File endorsement omitted.]

Order of Substitution

Filed March 30, 1956

[Title omitted.]

Upon consideration of appellees' motion to substitute Boyd Leedom as an appellee herein in the place and stead of Guy Farmer on the ground that as of November 18, 1955, Boyd Leedom succeeded Guy Farmer as Chairman of the National Labor Relations Board and to add Stephen S. Bean as an appellee on the ground that as of December 1, 1955, Stephen S. Bean succeeded to a vacancy on the National Labor Relations Board, and it appearing therefrom that appellant and intervenor have consented thereto, it is

Ordered that the aforesaid motion to substitute be, and it is hereby, granted.

Dated March 30, 1956.

130 *Designation of record* [omitted in printing]

131 Omit.

132 [Clerk's certificate to foregoing transcript omitted in printing.]

133 *Order authorizing clerk to transmit the original record, etc.* [omitted in printing]

134 Supreme Court of the United States

Order extending time to file petition for writ of certiorari

[Title omitted.]

Upon consideration of the application of counsel for petitioner(s),

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 7th, 1956.

EARL WARREN,
Chief Justice of the United States.

Dated this 31st day of January 1956.

136 Supreme Court of the United States

No. 826, October Term, 1955

Order allowing certiorari

Filed May 28, 1956

[Title omitted.]

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. The case is transferred to the summary calendar and assigned for argument immediately following No. 723 which is also placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE 1956

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. ---------

BOYD LEEDOM, ET AL., AS MEMBERS OF THE NATIONAL LABOR RELATIONS BOARD,[1] PETITIONERS

v.

INTERNATIONAL UNION OF MINE, MILL AND SMELTER WORKERS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on November 10, 1955, as amended March 15, 1956, reversing the District Court for its failure to issue a preliminary injunction against Board action declaring

[1] On November 18, 1955, Boyd Leedom succeeded Guy Farmer as Chairman of the Board, and on December 1, 1955, Stephen S. Bean succeeded to the vacancy of the fifth member of the Board. On March 30, 1956, the court below entered an order, providing for substitution of the new Board member in the instant case (R. 129).

respondent International Union of Mine, Mill and Smelter Workers (hereafter called "the Union") out of compliance with Section 9 (h) of the National Labor Relations Act, as amended. The Board action was based on findings, arrived at after investigation and hearing, that the non-Communist affidavits filed, pursuant to that section, by Union officer Maurice E. Travis were false, and that the Union membership was aware of their falsity.

OPINION BELOW

The opinion of the Court of Appeals, filed November 10, 1955, is set forth in Appendix A, *infra*, p. 26, and is reported at 226 F. 2d 780. The order of the Court of Appeals, filed March 15, 1956, which amended that Court's judgment of November 10, 1955, is set forth in Appendix A, *infra*, pp. 28–31, and has not been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on November 10, 1955 (App. A, *infra*, p. 27). On January 31, 1956, by order of Chief Justice Warren, the time for filing a petition for a writ of certiorari was extended to and including April 7, 1956 (App. B, *infra*, p. 32). Thereafter, on March 15, 1956, the Court of Appeals entered an order amending its earlier judgment (App. A, *infra*, pp. 28–31). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the National Labor Relations Board, upon finding that a union officer has filed false non-Communist affidavits and that the union membership was aware of their falsity, has power to declare the union out-of-compliance with Section 9 (h) of the National Labor Relations Act and to cancel any benefits under the Act accorded to the union on the basis of those affidavits.

STATUTE INVOLVED

Section 9 (h) of the National Labor Relations Act, as amended, 61 Stat. 136, 146, 65 Stat. 601, 602, 29 U. S. C. 159 (h), provides:

REPRESENTATIVES AND ELECTIONS

SEC. 9. * * *

(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with

such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits.

STATEMENT

1. THE EVENTS GIVING RISE TO THE BOARD'S ADMINISTRATIVE INVESTIGATION AND HEARING

Section 9 (h) of the National Labor Relations Act, as amended, (*supra*, pp. 3–4) disqualifies a labor organization from receiving statutory benefits under the Act unless each of its officers files annually with the Board an affidavit stating that he is not a member of or affiliated with the Communist Party, and that he does not believe in, or support, and is not a member of, any organization that believes in or teaches the overthrow of the Government by force or by illegal and unconstitutional methods.[2] Commencing in August 1949, and annually thereafter, the Union's Secretary-Treasurer, Maurice E. Travis, and the other Union officers filed such affidavits (R. 3–4, 38).[3]

In 1953, during the course of a proceeding be-

[2] The constitutionality of this provision was upheld by this court in *American Communications Association* v. *Douds*, 339 U. S. 382.

[3] When the instant suit was commenced, in February 1955, the most recent affidavit filed by Travis was dated October 19, 1954 (R. 4).

fore the Board entitled *Precision Scientific Company* (Case No. 13–CA–1441)—involving the question of whether that Company's refusal to bargain with the Union violated Section 8 (a) (5) of the Act—the Company (hereafter called "Precision") challenged the veracity of Travis' 9 (h) affidavits (R. 23–24). It alleged, *inter alia*, that, at the time he filed his initial affidavit in August 1949, Travis, in a statement published in the Union's newspaper and distributed to its members, asserted that he had resigned from the Communist Party solely in order to make it possible to execute a 9 (h) affidavit, but that he nevertheless continued to adhere to the principles of Communism and the Communist Party (R. 24, 76, 79).

On February 4, 1954, the Board, following its practice of treating the sufficiency of a union's compliance with Section 9 (h) as a subject which, though not litigable by private parties in representation or unfair labor practice proceedings, is appropriate for separate administrative investigation and determination, issued an order directing an administrative investigation and hearing (33 LRRM 1322–1323, R. 33–34). The order recited the above facts alleged by Precision and set forth the Board's view that, if Travis' affidavits were in fact false to the knowledge of the Union membership, this would require cancellation of the

Union's compliance status under the Act. It directed that a hearing be held before a hearing officer of the Board for the purpose of receiving evidence pertaining to the issues (1) whether Maurice E. Travis had admitted that the affidavits which he filed with the Board pursuant to Section 9 (h) of the Act were false, and (2) whether the membership of the Union was aware that such affidavits were false. The order also provided that, after issuance of the hearing officer's report, exceptions thereto, briefs, and requests for oral argument could be filed with the Board itself.

2. THE BOARD'S FINDINGS AND CONCLUSIONS

Hearings were held before a hearing officer of the Board between May 10 and July 14, 1954 (R. 24, 34). The Union and Travis were represented by counsel and were afforded full opportunity to be heard, to produce, examine, and cross-examine witnesses, to introduce evidence relevant to the issues specified in the Board's order, to argue orally, and to file briefs (*ibid.*).[4] Travis not only failed to appear or to take the stand in his own behalf, but he also refused to respond to a subpena *ad testificandum* issued at the request of the Board's General Counsel (R. 27, 36).

On September 10, 1954, the hearing officer issued his report finding, *inter alia,* that Travis'

[4] Counsel for Precision was also permitted to appear and to participate as *amicus curiae* (R. 34).

August 1949 statement disclosed on its face that his contemporaneous non-Communist affidavit filed with the Board was false; that the evidence disclosed that his subsequent affidavits were also false; and that the membership of the Union was aware of the falsity of Travis' 1949 and subsequent affidavits, yet continued to reelect him (R. 32–79). The Union and Travis were given an opportunity to, and did, file exceptions to the report and a supporting brief. In addition, they filed a motion for an order directing the hearing officer to withdraw his report and to conduct a further hearing (R. 25).

On February 1, 1955, the Board issued its determination and order (R. 23–32), adopting in general the hearing officer's report. The Board's findings and conclusions may be summarized as follows:

"The Travis statement, published in the Union newspaper of August 15, 1949, admits that the sole reason for his alleged resignation from the Communist Party was "in order to make it possible for me to sign the Taft-Hartley affidavit", and that such step was taken "with the utmost reluctance and with a great sense of indignation" (R. 76). The statement then goes on to assert, *inter alia*, that the "very premise of the Taft-Hartley affidavits is a big lie"; that it "is a big lie to say that a Communist trade unionist owes any higher loyalty than to his union"; and that the "biggest lie of all is to say that the Com-

munist Party teaches or advocates the overthrow of the government by force and violence" (R. 77). In addition, Travis frankly acknowledged that, despite his alleged severance of Communist Party ties, he continued to believe in "Communism", and emphasized (R. 78–79):

> I want to make it absolutely clear that my opinion continues to be that only a fundamental change in the structure of our society * * * can lead to the end of insecurity, discrimination, depressions and the danger of war.
>
> I am convinced that capitalistic greed is responsible for war and its attendant mass destruction and horror.

The Board found that this newspaper statement "disclosed on its face Travis' admission of the falsity of his August 4, 1949, non-Communist affidavit" (R. 25). In arriving at this conclusion, the Board considered the meaning of the statement in the light, *inter alia,* of the undisputed evidence of Travis' long-established position as a member of the Communist Party; of his role as one of its leaders within the Union; and of his admission to former Union official Mason that "the Party people" at Communist Party headquarters in New York had cleared the statement, and that "it meant that while Travis was resigning his membership in the Communist Party, it would not stop or change his work for it" (R. 26, 39–41, 60–61).

In the alternative, the Board concluded that, even when read literally, the statement constituted an admission of the falsity of Travis' 1949 affidavit (R. 26). As the Board noted (R. 27):

> It would stretch credulity beyond understanding were we required to assume that Travis had abandoned his Communist beliefs or his support of the Communist Party when he asseverates in the article "that good-Communists are good trade unionists" working against the "rotten * * * foundation of the capitalistic system," and that "despite my resignation from the Communist Party, I shall continue to fight for these goals with all the energy and sincerity at my command." [See also R. 61–64.]

The Board further found that the undisputed evidence showed that, subsequent to August 1949, Travis had "not altered his allegiance to nor support of the Communist Party, nor his belief in the overthrow by force and violence of this Government", and that hence his succeeding affidavits were likewise false (R. 27).[5] Thus, the uncontradicted testimony of Mason reveals that in August 1953 he requested Travis to give due recognition to the non-Communist faction in the Union and liberalize the official Union newspaper

[5] This finding has subsequently been confirmed by Travis' recent conviction, under 18 U. S. C. 1001, for filing false 9 (h) affidavits. See Daily Labor Report, December 22, 1955, No. 248, p. A–3.

so that it would not always reflect the Soviet side (R. 41–42). Travis' reply was that "Mason and his brother had a chance 'to be way up with us in these councils if you would rejoin the Communist Party'" (R. 42). Moreover, as to the paper, "Travis rejected Mason's suggestion summarily, saying 'You know as well as I do that the Party and my people will not stand for those proposals'" (R. 42–43, 64–65).

Finally, the Board found that "the Union membership was aware of the falsity of *all*[6] of Travis' affidavits" (R. 27). It based this conclusion on the "evidence of the publication, in the Union's official newspaper, of Travis' 1949 article in which he admitted the falsity of his initial affidavit, and the distribution of that newspaper to all the Union members; the fact of general awareness in this country of the true nature, aims and methods of Communism and the Communist Party; and the evidence * * * that the members of the Union were better equipped than the general public properly to evaluate Travis' 1949 newspaper article and his subsequent Communist activities" (R. 27–28). Summarizing the latter evidence, the Board pointed to "the CIO's investigation of Communist domination of the Union and its final expulsion of the Union from the CIO in 1950; the revolt of scores of locals from the Union over the Com-

[6] Emphasis in original.

munist issue; the Senate Sub-Committee (Judicial Committee) investigation in 1952 of Communist affiliation of Travis and other Union leaders, and Travis' refusal at the Sub-Committee hearing in Salt Lake City to testify regarding his non-Communist affidavits; and the resulting publicity to Union members" (R. 28, fn. 9; see also R. 43–46, 66–68).

On the basis of these findings, the Board concluded that the Union was not, and had not been, in compliance with the filing requirements of Section 9 (h) of the Act, and ordered that the Union be accorded no further benefits under the Act until it had complied with these requirements (R. 31–32).[7]

---

[7] The Union came back into compliance with Section 9 (h) on February 23, 1955, when, shortly after the instant suit was commenced, Travis resigned as Secretary-Treasurer and was replaced by Albert Pezzati, who filed the required affidavit. However, this does not make the instant suit moot. Since the complaint in the *Precision Scientific* case (*supra*, p. 5) was issued in June 1953, an affidavit by Travis is essential to its validity, and thus the propriety of a bargaining order in that case depends on whether the decompliance action here (R. 80–81) is sustained or nullified. The Board's order of February 16, 1955, dismissing the Union's complaint against Precision was vacated March 25, 1955, pursuant to the stay (*infra*, p. 12) issued by the court below. In addition, there are other cases where benefits, already accorded to the Union based on Travis' affidavits, would be subject to nullification were the Board's decompliance action sustained. *E. g.*, *Etiwan Fertilizer Co.*, 113 NLRB No. 11; *Magnus Metal Division of National Lead Co.* (Case No. 21–RC–3724); *Phelps-Dodge Copper Products Corp.*, 111 NLRB 950.

3. THE INSTANT SUIT

On February 10, 1955, the Union, contending, *inter alia,* that the Board's determination and order were beyond its powers under the Act, filed the instant suit in the United States District Court for the District of Columbia for injunctive relief against the Board action (R. 2–7). On February 11, 1955, that court, after hearing, denied the Union's motions for a temporary restraining order and a preliminary injunction (R. 10–12). The Union appealed the denial of the preliminary injunction to the Court of Appeals.

On February 21, 1955, the District Court granted Precision, whose obligation to bargain with the Union was affected by the Board's decompliance determination, leave to intervene in the suit as a party defendant, and to raise defenses in addition to those asserted by the Board; namely, that, even if the Board's action were beyond its powers under the Act, injunctive relief should nevertheless be denied the Union because it was not a *bona fide* labor organization and had "unclean hands" (R. 81–82, 101–112).

On February 25, 1955, the court below, pursuant to the Union's request, issued an order staying, during the pendency of the Union's appeal, the Board's decompliance determination as of the date of its issuance (35 LRRM 2577). On April

18, 1955, the Court of Appeals granted Precision leave to intervene as an appellee in the appeal.[8]

On November 10, 1955, the court below issued a *per curiam* opinion (App. A, *infra*, p. 26), stating that:

> The District Court's order, entered February 11, 1955, is reversed on the authority of *Farmer* v. *International Fur & Leather Workers Union*, — U. S. App. D. C., —, 221 F. 2d 862, decided February 15, 1955.

In the *Fur Workers* case, the Court of Appeals following its earlier decision in *Farmer* v. *United Electrical Workers*, 211 F. 2d 36, certiorari denied, 347 U. S. 943, had held that, under the scheme of the Act, a false 9 (h) affidavit gave rise only to a criminal penalty for the guilty union officer, and did not in any way alter the union's right to continued Board benefits, *even where* its members were aware of the officer's fraud.[9]

The judgment accompanying the foregoing opinion (App. A, *infra*, p. 27) remanded the case

[8] The record certified to the Court of Appeals contained the pleadings and proceedings before the District Court as of the time the appeal was filed, and also what had transpired in the District Court thereafter.

[9] In *United Electrical*, the court had only passed on the effect of a false affidavit absent membership awareness thereof, stating (211 F. 2d at 39): "We need not decide whether the union would be barred from the Act's benefits if its membership was aware of the alleged falsity of the affidavit."

to the District Court "for further proceedings not inconsistent with the opinion of this Court". On January 13, 1956, the District Court, viewing this opinion as not touching the issues interjected into the case by Precision (*supra*, p. 12), declined to enter a preliminary injunction. On March 15, 1956, the court below, pursuant to the Union's motion, entered an order (App. A, *infra*, pp. 28–31) which: (1) made clear that its earlier decision had encompassed all of the legal issues in the case, including those raised by Precision; and (2) amended the judgment of November 10, 1955, so as to remand the case to the District Court "with directions to issue a preliminary injunction".

REASONS FOR GRANTING THE WRIT

1. The holding of the court below that the sole consequence of a false 9 (h) affidavit is a criminal penalty for the officer perpetrating the fraud is in conflict with the decision of the Court of Appeals for the Sixth Circuit in *National Labor Relations Board* v. *Lannom Manufacturing Co.*, 226 F. 2d 194 (union petition for certiorari pending, No. 723, this Term), which holds that the conviction of a union officer for filing a false affidavit also affects the union's compliance status under the Act. Accordingly, the Board (a) has acquiesced in the petition filed in No. 723 insofar as it presents this question, and (b) is petitioning for certiorari in the instant case.

As noted in the Memorandum which the Board has filed in No. 723 (pp. 1–3), unless this conflict is resolved, the incongruous situation existing in No. 723 will continue and will probably be repeated in other cases. That is, the court below, which has exclusive venue over prohibitory suits against the Board, requires the Board to treat a union in compliance with Section 9 (h) of the Act, notwithstanding the falsity of its officer's non-Communist affidavit. However, when the Board seeks to comply with this mandate by filing an enforcement petition to secure the Act's benefits for the union in the Sixth Circuit, or any other circuit holding a similar view,[10] the petition may be dismissed on the ground that the union has not in fact complied with Section 9 (h). This situation, which results in frustrating both the administration of the Act and the judicial process, clearly calls for review by this Court.

2. The considerations justifying the grant of certiorari in this case are not diminished by the circumstance that the basic question of the Board's powers in respect to false 9 (h) affidavits was previously presented to this Court in two petitions which were denied in the October Term, 1953. *Farmer* v. *United Electrical Workers,* No. 597, and *Farmer* v. *International Fur and Leather Workers,* No. 598, certiorari denied, 347 U. S.

[10] See *National Labor Relations Board* v. *Vulcan Furniture Manufacturing Corp.*, 214 F. 2d 369, 371 (C. A. 5), certiorari denied, 348 U. S. 873.

943 (April 12, 1954). At the time these petitions were filed, no conflict between circuits, requiring resolution by this Court, had developed. Moreover, the earlier cases presented the compliance question in a posture which was less definitive, and hence perhaps less suitable for review, than that which exists in the instant case and in No. 723.

Thus, in *United Electrical,* the Board, prompted by the refusal of certain union officers, both before Congressional committees and a grand jury, to acknowledge the validity of the non-Communist affidavits which they had previously filed with the Board, had sent each officer a questionnaire requesting reaffirmation of his affidavits. The District Court enjoined the Board from conducting this investigation on the ground that, under the Act, the truth or falsity of an officer's 9 (h) affidavit was irrelevant to the Board's function; the court below affirmed, reserving the situation where the union membership might be aware of the officer's fraud (see fn. 9, *supra,* p. 13); and the Board petitioned for certiorari to review the Court of Appeals' decision. The companion petition in *Fur Workers* sought to by-pass the Court of Appeals and to review the action of the District Court, 117 F. Supp. 35 (D. D. C.), in enjoining, on the authority of *United Electrical,* the further Board measure of deferring, pending the outcome of the criminal proceeding, repre-

sentation cases involving a union whose officer had been indicted, under Section 35A of the Criminal Code (18 U. S. C. 1001) for filing a false non-Communist affidavit. Here, and in No. 723, on the other hand, there has been no attempt to by-pass the Court of Appeals and the question of the Board's powers is presented in a situation where the falsity of the officer's affidavit has clearly been established, and where it is also apparent that the union membership was aware of the falsity.[11]

In these circumstances, the earlier denials of certiorari are manifestly not dispositive of the instant petition or that in No. 723.

3. As this Court has recognized, Section 9 (h) of the Act was designed to minimize the threat of "political strikes" by "exerting pressures on unions to deny office to Communists" and other exponents of violent overthrow of the Government. *American Communications Association* v. *Douds*, 339 U. S. 382, 393. The holding of the court below that the sole consequence of a false 9 (h) affidavit is a criminal penalty for the officer filing the affidavit reduces this leverage to a feeble reed.

If the officer, though still a Communist, is will-

[11] In the instant case, these facts came to light through the Board's own investigation and hearing; in No. 723, they were established by the officer's criminal conviction for filing a false affidavit, after which the union nevertheless reelected him to his office.

ing to file a 9 (h) affidavit,[12] the union incurs no risk by keeping him in office even when, as here, its members are aware of his fraud from the outset. Similarly, should the union discover after the officer has filed an affidavit that he is still a Communist, the Act would provide no incentive for removing him from office, even where, as in No. 723, the officer's deceit has been established in criminal proceedings. To be sure, the officer may go to jail, but the union is able to keep all the benefits under the Act which it improperly acquired as a result of his wrongdoing. Finally, under the interpretation of the court below, the Board would be required, even where the officer admits the falsity of his affidavit at the time he filed it with the Board (which, in effect, is the situation in this case), to honor that affidavit and accord benefits to the union based thereon. To accord benefits to a union, one of whose officers is an undenied Communist, certainly frustrates "the congressional purpose * * * to 'wholly eradicate and bar from leadership in the American labor movement, at each and every level, adherents to the Communist party and believers in the unconstitutional overthrow of our Govern-

[12] It is now clear that the Communist Party of the U. S. A. has long followed the policy of having its members "formally" resign without really severing Party ties, and that this policy was specifically adopted in respect to 9 (h) affidavits. See R. 41; *Hupman* v. *United States*, 219 F. 2d 243, 247–248 (C. A. 6), certiorari denied, 349 U. S. 953.

ment.'" *National Labor Relations Board* v. *Highland Park Mfg. Co.*, 341 U. S. 322, 325.

4. The holding of the court below rests on the premise that, by explicitly providing "a criminal penalty for false non-Communist affidavits",[13] Congress intended to make the veracity of the affidavit irrelevant to the Board's function; for it "assumed that this threat of criminal sanctions would be a sufficient deterrent to false swearing by union officers". See *Farmer* v. *International Fur and Leather Workers Union*, 221 F. 2d 862, 864 (C. A. D. C.). This assumption, which substantially impairs the effectivness of Section 9 (h) (see pp. 17–18, *supra*), is wholly unwarranted.

The legislative history of Section 9 (h) discloses that the version of the provision which was originally passed by both houses of Congress forbade the granting of benefits under the Act to any labor union if its officers were members of the Communist Party or held other proscribed membership, affiliation or belief.[14] Under that version, the Board, *prior* to conferring benefits under the Act, would have had to conduct an inquiry into whether the officers were in fact free of the disqualifying characteristics (93 Cong. Rec. 6375, 6381). This was changed in conference—to the

[13] Section 9 (h) (*supra*, pp. 3–4) provides, *inter alia*, that "section 35A of the Criminal Code [18 U. S. C. 1001] shall be applicable in respect to such affidavits."

[14] 1 Legislatitve History of the Labor Management Relations Act, 1947 (Gov't Print. Off., 1948), pp. 190, 251.

present requirement that officers file disclaiming affidavits which, like other statements made to the Government, would be subject to Section 35A of the Criminal Code—solely for the reason that Board proceedings "might be indefinitely delayed if the Board *was required* to investigate the character of all the local and national officers as well as the character of the officers of the parent body or federation." [Emphasis added.][15]

Hence, Congress, in order to avoid delays in Board proceedings, made it clear that the Board was not required to permit private parties to such proceedings to litigate the alleged Communist character of the union involved.[16] It decided instead that the filing of disclaiming affidavits would be sufficient to open Board processes. However, it does not follow therefrom that there was any Congressional purpose to have this initial acceptance of affidavits preclude the Board itself, when fraud has been subsequently established in crimi-

[15] 93 Cong. Rec. 6444 (Senator Taft). See also, *id.*, at 6447, 6860; 1 Leg. Hist. 553.

[16] See *Aerovox Corp.* v. *National Labor Relations Board*, 211 F. 2d 640 (C. A. D. C.), certiorari denied, 347 U. S. 968; *National Labor Relations Board* v. *Sharples Chemicals, Inc.*, 209 F. 2d 645, 649–651 (C. A. 6); *National Labor Relations Board* v. *Vulcan Furniture Mfg. Corp.*, 214 F. 2d 369, 371 (C. A. 5), certiorari denied, 348 U. S. 873; *American Rubber Products Corp.* v. *National Labor Relations Board*, 214 F. 2d 47, 55 (C. A. 7). Cf. *National Labor Relations Board* v. *Coca-Cola Bottling Co.*, No. 79, this Term, decided February 27, 1956.

nal or separate administrative proceedings, from altering the union's compliance status.

In these circumstances, the Board's action does not interrupt or otherwise delay particular unfair labor practice or representation proceedings, the problem which concerned Congress in adopting the affidavit technique. Accordingly, to read the legislative history as precluding Board power to decomply the union where the falsity of the officer's affidavit is subsequently established in separate proceedings, serves only to make the filing of affidavits, a requirement inserted solely as a means for facilitating the goal of withholding the Act's benefits from unions with Communist leadership,[17] the ultimate end of Section 9 (h); the affidavit technique, which was adopted only for the purpose of easing the Board's burden in unfair labor practice and representation cases, becomes a means of lessening the union's responsibility to clean out Communist officers.

On the other hand, to read this history as not precluding Board decompliance in such situation, gives effect to Congress' adoption of the affidavit technique, without at the same time obscuring the basic objective of Section 9 (h). The filing

[17] See *American Communications Association* v. *Douds*, 339 U. S. 382, 388; *National Labor Relations Board* v. *Highland Park Mfg. Co.*, 341 U. S. 322, 325; *National Maritime Union of America* v. *Herzog*, 78 F. Supp. 146, 162, 166–171, 175 (D. D. C.), affirmed, 334 U. S. 854.

of the required affidavits is sufficient to open up Board processes to a union, thereby avoiding collateral litigation in particular unfair labor practice and representation cases as to whether the union has rid itself of Communist leaders. However, this does not discharge the union's responsibility to insure that its house is in fact clean, for the benefits obtained on the basis of the affidavits may be lost should it subsequently be established, in separate proceedings which do not interrupt the course of particular unfair labor practice or representation cases, that they are false. The union is thus prompted to keep a continuing check on its officers, and to remove a Communist as soon as his deceit comes to light.

The Board's reading of the legislative history is also consistent with the scheme of Section 9 (h) which empowers the Board to declare a union out of compliance when, *inter alia,* an officer's affidavit has expired, the complement of officers has changed, or it has been found that certain union officials, who were in fact officers within the meaning of the section, have failed to file affidavits.[18] It seems hardly likely that Congress, although allowing the Board to alter the union's

[18] See National Labor Relations Board, 15th Annual Report (Gov't Print. Off., 1951), pp. 26–28; *National Labor Relations Board* v. *Dant*, 344 U. S. 375, 383; *National Labor Relations Board* v. *Coca-Cola Bottling Co.*, No. 79, this Term, decided February 27, 1956.

compliance status in these situations,[19] precluded the Board from altering the union's compliance status in the more serious situation where the falsity of the affidavit itself has become apparent.

That Congress did not decide to preclude the Board from withdrawing the benefits of the Act when the falsity of an officer's 9 (h) affidavit has been established is further confirmed by a Senate report issued subsequent to the enactment of Section 9 (h).[20] This report discussed the steps which the Board had taken to prevent circumvention of Section 9 (h), including, as in the case of the *United Packinghouse Workers (Local 80A)* (101 NLRB 1253), the revocation of the union's compliance status and certifications on conviction of its officer for filing a false affidavit (pp. 8–9). It then concluded, *inter alia,* that such action is within the Board's "authority under existing law," and not inconsistent with Congress' intention to avoid Board conduct of "an independent investigation on the merits as to whether a par-

[19] This is often a "matter of happenstance" as regards "unions which do have leadership willing to comply". *National Labor Relations Board* v. *Dant*, 344 U. S. at 383, 384.

[20] *Public Policy and Communist Domination of Certain Unions*, S. Doc. No. 26, 83d Cong., 1st Sess., Report of the Subcommittee on Labor and Labor-Management Relations, March 2, 1953. The propriety of utilizing such post-legislative material has been recognized. See *Herzog* v. *Parsons*, 181 F. 2d 781, 785 (C. A. D. C.), certiorari denied, 340 U. S. 810; *National Labor Relations Board* v. *Wiltse*, 188 F. 2d 917, 922–923 (C. A. 6), certiorari denied *sub nom. Ann Arbor Press, Inc.* v. *National Labor Relations Board*, 342 U. S. 859.

ticular 9 (h) affiant is or is not a Communist" (*id.*, at 28–29). The false affidavit constitutes an "obvious abuse" of Board processes, and Section 9 (h) does not affect the power which the Act otherwise confers upon the Board "'to protect its own processes from abuse'" (*ibid.*).[21]

[21] This view is not inconsistent with the recent enactment of the Communist Control Act of 1954, 68 Stat. 775, Section 10 of which, *inter alia*, empowers the Subversive Activities Control Board to determine whether a labor organization is Communist-infiltrated, and provides that, upon such finding, the union shall be deprived of benefits under the National Labor Relations Act. 68 Stat. at 778, 50 U. S. C. (1952 ed. Supp. II) 792a. This new law does not purport to repeal Section 9 (h) of the Act, or otherwise lessen whatever powers the Board may have had thereunder. It recognizes that, with Section 9 (h) alone, many Communist-controlled unions could still obtain Board benefits; for to preclude them, it is necessary first to establish that their officers have filed false affidavits, a matter often difficult of proof. To meet this problem, this Act broadens the circumstances under which a union may be deemed Communist-controlled, enabling the SACB to make such determination on the basis of a variety of factors indicative of Communist-leadership and control. However, from this, it does not follow that the new law was designed to preclude the Board from continuing to deny benefits in any case where, as here, the rarer evidence that an officer falsified his 9 (h) affidavit exists. See R. 31, fn. 10.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

SIMON E. SOBELOFF,
Solicitor General.

THEOPHIL C. KAMMHOLZ,
General Counsel,

DAVID P. FINDLING,
Associate General Counsel,

DOMINICK L. MANOLI,
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Attorney,
National Labor Relations Board.

APRIL 1956.

APPENDIX A

COURT OF APPEALS OPINION, JUDGMENT, AND ORDER

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12573

INTERNATIONAL UNION OF MINE, MILL AND SMELTER WORKERS, APPELLANT

v.

GUY FARMER, ET AL., AS MEMBERS OF THE NATIONAL LABOR RELATIONS BOARD, APPELLEES,

AND

PRECISION SCIENTIFIC COMPANY, AN ILLINOIS COMPANY, INTERVENOR

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Decided November 10, 1955

Before EDGERTON, Chief Judge, and WASHINGTON and BASTIAN, Circuit Judges.

Per Curiam: The District Court's order, entered February 11, 1955, is reversed on the authority of *Farmer* v. *International Fur & Leather Workers Union*, — U. S. App. D. C. ——, 221 F. 2d 862, decided February 15, 1955.

Reversed.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,573. October Term, 1955

INTERNATIONAL UNION OF MINE, MILL AND SMELTER WORKERS, APPELLANT

v.

GUY FARMER, ET AL., AS MEMBERS OF THE NATIONAL LABOR RELATIONS BOARD, APPELLEES,

PRECISION SCIENTIFIC COMPANY, AN ILLINOIS COMPANY, INTERVENOR

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before EDGERTON, Chief Judge, and WASHINGTON and BASTIAN, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, It is ordered and adjudged by this Court that the order of the said District Court appealed from in this cause be, and the same is hereby, reversed, and that this cause be, and the same is hereby, remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court.

Dated: NOVEMBER 10, 1955.

PER CURIAM.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,573. January Term, 1956

INTERNATIONAL UNION OF MINE, MILL AND SMELTER WORKERS, APPELLANT

v.

GUY F. FARMER, ET AL., AS MEMBERS OF THE NATIONAL LABOR RELATIONS BOARD, APPELLEES,

PRECISION SCIENTIFIC COMPANY, INTERVENOR

Before: EDGERTON, Chief Judge, and WASHINGTON and BASTIAN, Circuit Judges.

ORDER

Whereas appellant's motion filed herein February 27, 1956, for issuance of a mandate by this Court in this case and for other action to effectuate the judgment of this Court entered herein November 10, 1955, duly came on for hearing before this Court and was argued by counsel; and

Whereas it appears from said motion filed in this Court February 27, 1956, and from the transcript of the proceedings before the District Court on January 13, 1956, that pursuant to said judgment of this Court entered November 10, 1955, this appellant submitted to the District Court a proposed order for a preliminary injunction to carry out the judgment of this Court but that after a hearing thereon the District Court refused to enter a preliminary injunction but instead on January 13, 1956, ordered the case "restored to the non-jury calendar for the trial of issues not covered by" the judgment of this Court; and

Whereas said motion filed in this Court on February 27, 1956, may be treated by this Court as the equivalent of the taking of an appeal from the order of January 13, 1956, in so far as that order refuses a preliminary injunction, thus giving this Court jurisdiction to review the refusal of the District Court to issue a preliminary injunction in this case (See *Gerringer* v. *United States,* 93 U. S. App. D. C. 403, 213 F. 2d 346 (1954); *West* v. *United States,* 94 U. S. App. D. C. 46, 222 F. 2d 774 (1954); *R. F. C.* v. *Prudence Group,* 311 U. S. 579 (1941); *Lemke* v. *United States,* 346 U. S. 325 (1953)); or may be treated as a petition for writ of mandamus to compel the District Court to issue a preliminary injunction in this case; or may be treated as a motion to modify the judgment of this Court entered herein November 10, 1955; and

Whereas in the consideration of this appeal prior to the rendition of its opinion and judgment on November 10, 1955, this Court had before it sufficient material in the record from which it could and did conclude:

> (1) that the contention that the appellant lacks "clean hands" was not a sufficient reason for the denial of a preliminary injunction in this case;
>
> (2) that the District Court failed to reconsider its order on appeal herein in the light of the decision of this Court in *Farmer* v. *International Fur and Leather Workers Union,* 95 U. S. App. D. C. 308, 222 F. 2d 862, decided February 15, 1955, four days after the entry of the order of the District Court on appeal herein:
>
> (3) that the contention that the appellant was not "a labor union" within the

meaning of § 2 (5) of the National Labor Relations Act, 1947, was frivolous and did not constitute a reason for the denial of a preliminary injunction in this case; and

(4) that the contention that the affidavit in support of appellant's request for a preliminary injunction was improperly executed or was inadequate in any material respect would appear unsupported in the circumstances of this case;

Now, therefore, the Court having duly considered the foregoing matters, and no suggestion having been made by appellees that any reason exists for the denial of a preliminary injunction other than as reflected in the contentions enumerated above, or that circumstances have in the interim changed in any material respect, and the Court being of the view that the end result, namely, requiring the issuance of a preliminary injunction, would be the same whether the motion filed herein February 27, 1956, be treated as the equivalent of the taking of an appeal or as a petition for writ of mandamus, or for amendment of our judgment of November 10, 1955, we conclude that "to secure the just, speedy, and inexpensive determination" of this action (Rule 1, Federal Rules of Civil Procedure), justice will be best subserved by amending our judgment entered November 10, 1955, so as to require the District Court to issue a preliminary injunction as we intended, and as was issued by the District Court in *Farmer* v. *International Fur and Leather Workers Union,* which ruling this Court affirmed and which we relied on in our opinion of November 10, 1955, in this case.

Accordingly, it is ordered by the Court that the last paragraph of the judgment of this Court entered herein November 10, 1955, be, and it is hereby, amended by striking out the words "for further proceedings not inconsistent with the opinion of this Court" and inserting in lieu thereof the words "with directions to issue a preliminary injunction."

It is further ordered by the Court that the certified copy of the judgment of this Court dated November 10, 1955, in this case which issued to the District Court on December 9, 1955, be, and it is hereby, recalled.

It is further ordered by the Court that the Clerk be, and he is hereby, directed to issue a mandate to the District Court in this case on March 28, 1956.

PER CURIAM.

Dated: MARCH 15, 1956

APPENDIX B

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

SUPREME COURT OF THE UNITED STATES

No. ——

OCTOBER TERM, 1955

GUY FARMER, ET AL., AS MEMBERS OF THE NATIONAL LABOR RELATIONS BOARD, PETITIONERS

vs.

INTERNATIONAL UNION OF MINE, MILL AND SMELTER WORKERS

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon consideration of the application of counsel for petitioner(s),

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 7, 1956.

EARL WARREN,
Chief Justice of the United States.

Dated this 31st day of January 1956.

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CITATIONS

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 57

BOYD LEEDOM, ET AL., AS MEMBERS OF THE NATIONAL LABOR RELATIONS BOARD, PETITIONERS

v.

INTERNATIONAL UNION OF MINE, MILL AND SMELTER WORKERS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

ORDERS AND OPINIONS BELOW

The *per curiam* opinion of the Court of Appeals (R. 113), filed November 10, 1955, is reported at 226 F. 2d 780. The order of the Court of Appeals, filed March 15, 1956, which amended that court's judgment of November 10, 1955, is set forth at R. 119-121.

JURISDICTION

The judgment of the Court of Appeals was entered on November 10, 1955 (R. 115). On January 31, 1956, by order of Chief Justice Warren, the time for filing

a petition for a writ of certiorari was extended to and including April 7, 1956 (R. 122). Thereafter, on March 15, 1956, the Court of Appeals entered an order amending its earlier judgment (R. 119-121). The petition for a writ of certiorari was filed April 6, 1956, and was granted on May 28, 1956 (R. 122). The jurisdiction of this Court rests on 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether the National Labor Relations Board has power to declare a union out of compliance with Section 9 (h) of the National Labor Relations Act, upon finding in separate administrative proceedings, that an officer of the union has filed false non-Communist affidavits and that the union membership was aware of their falsity.

STATUTE INVOLVED

Section 9 (h) of the National Labor Relations Act, as amended, 61 Stat. 136, 146, 65 Stat. 601, 602, 29 U.S.C. 159 (h), provides:

REPRESENTATIVES AND ELECTIONS

SEC. 9 * * *

(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constitu-

ent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits.

STATEMENT

This case arises out of the National Labor Relations Board's Determination and Order of February 1, 1955 (111 NLRB 422; R. 23-32), which declared the International Union of Mine, Mill and Smelter Workers ("the Union") out of compliance with Section 9 (h) of the National Labor Relations Act. This action was based on findings, arrived at in separate administrative proceedings and after hearing, that the non-Communist affidavits filed pursuant to that section by Union officer Maurice E. Travis were false, and that the Union membership was aware of their falsity.

1. *The events giving rise to the Board's compliance proceeding*

Commencing in August 1949, and annually thereafter, Travis, the Union's Secretary-Treasurer, as well as the other officers of the Union, filed with the Board the affidavits required by Section 9 (h).[1] The Board, presuming the affidavits to be truthful, regarded the Union as in compliance with Section 9 (h) and accorded it the Act's benefits (R. 3-4, 38).

[1] When the instant suit was commenced in February 1955, the most recent affidavit filed by Travis was dated October 19, 1954 (R. 4).

However, in 1953, during the course of a proceeding before the Board entitled *Precision Scientific Company* (Case No. 13-CA-1441)—involving the question of whether that company's refusal to bargain with the Union violated Section 8 (a) (5) of the Act—the Company ("Precision") challenged the veracity of Travis' Section 9 (h) affidavits. It alleged, *inter alia,* that, at the time he filed his initial affidavit in August 1949, Travis, in a statement published in the Union's newspaper and distributed to its members, asserted that he had resigned from the Communist Party solely in order to make it possible to execute a Section 9 (h) affidavit, but that he nevertheless continued to adhere to the principles of Communism and the Communist Party (R. 24, 76, 79).

On February 4, 1954, the Board, treating the sufficiency of a union's compliance with Section 9 (h) as a subject which, though not litigable by private parties in representation or unfair labor practice proceedings, is appropriate for separate administrative investigation and determination, issued an order directing an administrative investigation and hearing (33 LRRM 1322-1323, R. 33-34). The order recited the above facts alleged by Precision and set forth the Board's view that, if Travis' affidavits were in fact false to the knowledge of the Union membership, this would require cancellation of the Union's compliance status under the Act. It directed that a hearing be held before a hearing officer of the Board for the purpose of receiving evidence pertaining to the issues (1) whether Maurice E. Travis had admitted that the affidavits which he filed with the Board pursuant to Section 9 (h) of the Act were false, and (2) whether the

membership of the Union was aware that such affidavits were false. The order also provided that—after issuance of the hearing officer's report—exceptions thereto, briefs, and requests for oral argument could be filed with the Board itself.

2. *The Board's findings and conclusions*

Hearings were held before a hearing officer of the Board between May 10 and July 14, 1954 (R. 24, 34). The Union and Travis were represented by counsel and were afforded full opportunity to be heard, to produce, examine, and cross-examine witnesses, to introduce evidence relevant to the issues specified in the Board's order, to argue orally, and to file briefs *(ibid.)*.[2] Travis not only failed to appear or to take the stand in his own behalf, but he also refused to respond to a subpena *ad testificandum* issued at the request of the Board's General Counsel (R. 27, 36).

On September 10, 1954, the hearing officer issued his report finding, among other things, that Travis' August 1949 statement disclosed on its face that his contemporaneous non-Communist affidavit filed with the Board was false; that the evidence disclosed that his subsequent affidavits were also false; and that the membership of the Union was aware of the falsity of Travis' 1949 and subsequent affidavits, yet continued to reelect him (R. 32-79). The Union and Travis were given an opportunity to, and did, file exceptions to the report and a supporting brief. In addition, they filed a motion for an order directing the hearing officer to withdraw his report and to conduct a further hearing (R. 25).

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[2] Counsel for Precision was also permitted to appear and to participate as *amicus curiae* (R. 34).

On February 1, 1955, the Board issued its determination and order (R. 23-32, 111 NLRB 422), adopting in general the hearing officer's report. The Board's findings and conclusions may be summarized as follows:

The Travis statement, published in the Union newspaper of August 15, 1949, admits that the sole reason for his alleged resignation from the Communist Party was "in order to make it possible for me to sign the Taft-Hartley affidavit", and that such step was taken "with the utmost reluctance and with a great sense of indignation" (R. 76). The statement then goes on to assert, *inter alia,* that the "very premise of the Taft-Hartley affidavits is a big lie"; that it "is a big lie to say that a Communist trade unionist owes any higher loyalty than to his union"; and that the "biggest lie of all is to say that the Communist Party teaches or advocates the overthrow of the government by force and violence" (R. 77). In addition, Travis frankly acknowledged that, despite his alleged severance of Communist Party ties, he continued to believe in "Communism", and emphasized (R. 78-79):

> I want to make it absolutely clear that my opinion continues to be that only a fundamental change in the structure of our society * * * can lead to the end of insecurity, discrimination, depressions and the danger of war.
>
> I am convinced that capitalistic greed is responsible for war and its attendant mass destruction and horror.

The Board found that this newspaper statement "disclosed on its face Travis' admission of the falsity of

his August 4, 1949, non-Communist affidavit" (R. 25). In arriving at this conclusion, the Board considered the meaning of the statement in the light of the undisputed evidence of Travis' long-established position as a member of the Communist Party; of his role as one of its leaders within the Union; and of his admission to former Union official Mason that "the Party people" at Communist Party headquarters in New York had cleared the statement, and that "it meant that while Travis was resigning his membership in the Communist Party, it would not stop or change his work for it" (R. 26, 39-41, 60-61).

In the alternative, the Board concluded that, even when read literally, the statement constituted an admission of the falsity of Travis' 1949 affidavit (R. 26). As the Board noted (R. 27):

> It would stretch credulity beyond understanding were we required to assume that Travis had abandoned his Communist beliefs or his support of the Communist Party when he asseverates in the article "that good Communists are good trade unionists" working against the "rotten * * * foundation of the capitalistic system," and that "despite my resignation from the Communist Party, I shall continue to fight for these goals with all the energy and sincerity at my command." [See also R. 61-64.]

The Board further found that the undisputed evidence showed that, subsequent to August 1949, Travis had "not altered his allegiance to nor support of the Communist Party, nor his belief in the overthrow by force and violence of this Government", and that his

succeeding affidavits were likewise false (R. 27).[3] Thus, the uncontradicted testimony of Mason reveals that in August 1953 he requested Travis to give due recognition to the non-Communist faction in the Union and liberalize the official Union newspaper so that it would not always reflect the Soviet side (R. 41-42). Travis' reply was that "Mason and his brother had a chance 'to be way up with us in these councils if you would rejoin the Communist Party' " (R. 42). Moreover, as to the paper, "Travis rejected Mason's suggestion summarily, saying 'You know as well as I do that the Party and my people will not stand for those proposals' " (R. 42-43, 64-65).

Finally, the Board found that "the Union membership was aware of the falsity of *all* of Travis' affidavits" (R. 27). It based this conclusion on the "evidence of the publication, in the Union's official newspaper, of Travis' 1949 article in which he admitted the falsity of his initial affidavit, and the distribution of that newspaper to all the Union members; the fact of general awareness in this country of the true nature, aims and methods of Communism and the Communist Party; and the evidence * * * that the members of the Union were better equipped than the general public properly to evaluate Travis' 1949 newspaper article and his subsequent Communist activities" (R. 27-28). Summarizing the latter evidence, the Board pointed to "the CIO's investigation of Communist domination of the Union and its final expulsion of the Union from the CIO in 1950; the revolt of scores of locals from the

[3] This finding has subsequently been confirmed by Travis' recent conviction under 18 U.S.C. 1001, for filing false Section 9 (h) affidavits in 1951 and 1952. See Daily Labor Report, December 22, 1955, No. 248, p. A-3.

Union over the Communist issue; the Senate Sub-Committee (Judicial Committee) investigation in 1952 of Communist affiliation of Travis and other Union leaders, and Travis' refusal at the Sub-Committee hearing in Salt Lake City to testify regarding his non-Communist affidavits;[4] and the resulting publicity to Union members" (R. 28, fn. 9; see also R. 43-46, 66-68).

On the basis of these findings, the Board concluded that the Union was not, and had not been, in compliance with the filing requirements of Section 9(h) of the Act, and ordered that the Union be accorded no further benefits under the Act until it had complied with these requirements (R. 31-32).[5]

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[4] *Communist Domination of Union Officials in Vital Defense Industry—International Union of Mine, Mill and Smelter Workers*, Hearings before the Subcommittee to Investigate the Administration of the Internal Security Act and other Internal Security Laws, Senate Committee on the Judiciary, 82d Cong., 2d Sess., October, 1952.

[5] The Union came back into compliance with Section 9(h) on February 23, 1955, when, shortly after the instant suit was commenced, Travis resigned as Secretary-Treasurer and was replaced by Albert Pezzati, who filed the required affidavit. However, this does not make the instant suit moot. Since the complaint in the *Precision Scientific* case (*supra*, p. 4) was issued in June 1953, an affidavit by Travis is essential to its validity, and thus the propriety of a bargaining order in that case depends on whether the present decompliance action is sustained or nullified. Hence, upon declaring the Union out of compliance, the Board, on February 16, 1955, dismissed the complaint against Precision (R. 80-81), which action was vacated March 25, 1955, pursuant to the stay of the decompliance determination (*infra*, p. 10) issued by the court below. In addition, there are other cases where benefits, already accorded to the Union on the basis of Travis' affidavits, would be subject to nullification were the Board's decompliance action sustained. E.g., *Etiwan Fertilizer Co.*, 113 NLRB 93; *Magnus Metal Division of National Lead Co.* (Case No. 21-RC-3724); *Phelps-Dodge Copper Products Corp.*, 111 NLRB 950.

3. *The Instant Suit*

On February 10, 1955, the Union, contending, *inter alia*, that the Board's determination and order were beyond its powers under the Act, filed the instant suit in the United States District Court for the District of Columbia, for injunctive relief against the Board's action (R. 2-7). On February 11, 1955, that court, after hearing, denied the Union's motions for a temporary restraining order and a preliminary injunction (R. 10-12). The Union appealed the denial of the preliminary injunction to the Court of Appeals.

On February 21, 1955, the District Court granted Precision, whose obligation to bargain with the Union was affected by the Board's decompliance determination, leave to intervene in the suit as a party defendant, and to raise defenses in addition to those asserted by the Board, namely, that, even if the Board's action were beyond its powers under the Act, injunctive relief should nevertheless be denied the Union because it was not a *bona fide* labor organization and had "unclean hands" (R. 81-82, 101-112).

On February 25, 1955, the Court of Appeals, pursuant to the Union's request, issued an order staying, during the pendency of the Union's appeal, the Board's decompliance determination as of the date of its issuance (35 LRRM 2577). On April 18, 1955, that court granted Precision leave to intervene as an appellee in the appeal.

On November 10, 1955, the Court of Appeals issued a *per curiam* opinion (R. 113), stating that:

> The District Court's order, entered February 11, 1955, is reversed on the authority of *Farmer* v. *International Fur & Leather Workers Union*,—

U.S. App. D.C., —, 221 F. 2d 862, decided February 15, 1955.

In the *Fur Workers* case, the Court of Appeals, following its earlier decision in *Farmer* v. *United Electrical Workers,* 211 F. 2d 36, certiorari denied, 347 U.S. 943, had held that, under the scheme of the Act, a false Section 9 (h) affidavit gave rise only to a criminal penalty for the guilty union officer, and did not in any way alter the union's right to continued Board benefits, even where its members were aware of the officer's fraud.[6]

The judgment accompanying the *per curiam* opinion (R. 114) remanded the case to the District Court "for further proceedings not inconsistent with the opinion of this Court." On January 13, 1956, the District Court, viewing this opinion as not touching the issues interjected into the case by Precision (*supra,* p. 10), declined to enter a preliminary injunction (R. 118-119). On March 15, 1956, the Court of Appeals, pursuant to the Union's motion, entered an order (R. 119-121) which: (1) made clear that its earlier decision had encompassed all of the legal issues in the case, including those raised by Precision, and (2) amended the judgment of November 10, 1955, so as to remand the case to the District Court "with directions to issue a preliminary injunction."[7]

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[6] In *United Electrical,* the court had only passed on the effect of a false affidavit, absent membership awareness thereof, stating (211 F. 2d at 39). "We need not decide whether the union would be barred from the Act's benefits if its membership was aware of the alleged falsity of the affidavit."

[7] Thereafter, on April 18, 1956, the District Court entered a preliminary injunction, enjoining the Board from giving effect to the decompliance determination at issue herein.

SUMMARY OF ARGUMENT

Section 9(h) of the National Labor Relations Act prohibits the Board from investigating a representation question involving a labor organization, or from issuing an unfair labor complaint based on that organization's charge, unless there is on file with the Board a non-Communist "affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit." The Section further provides that the "provisions of section 35A of the Criminal Code [18 U.S.C. 1001] shall be applicable in respect to such affidavits."

It is the position of the court below that Congress intended this criminal penalty to be the sole consequence of a false affidavit, and to make the veracity of the officer's affidavit irrelevant to the Board's functioning. In its view, Section 9(h) imposes on the Board the purely ministerial duty of seeing that the required affidavits are on file; if they are, the Board must accord the union the Act's benefits, and must continue to do so even should it be established in criminal proceedings that "what in form is an affidavit is merely a paper evidencing false swearing." *National Labor Relations Board* v. *Vulcan Furniture Mfg. Co.*, 214 F. 2d 369, 371 (C.A. 5), certiorari denied, 348 U.S. 873.

It is the Board's position, on the other hand, that the filing of a false affidavit constitutes an abuse of Board processes, and that, both apart from and under Section 9(h), the Board possesses implied power to protect its processes from abuse. Accordingly, the Board may satisfy itself as to the veracity of an of-

ficer's affidavits, and, should their falsity be established, either through the Board's separate administrative investigation or criminal proceedings instituted against the officer by the Department of Justice under 18 U.S.C. 1001, the Board is empowered to cancel the union's compliance status under the Act and to revoke any certifications or other benefits dependent upon valid affidavits from that officer.

I

We first detail the Board's efforts to protect against fraudulent compliance with Section 9 (h), showing, in particular, that by the end of 1952 there had occurred certain events—including a conviction of a union officer for filing a false affidavit, and a grand jury presentment in New York questioning the truthfulness of other affidavits—which caused the Board to conclude that it was required to concern itself with the veracity of the affidavits. However, the court below has consistently held that the Board has no such power, and has enjoined efforts by the Board administratively to remedy the filing of false affidavits.

II

In *National Labor Relations Board* v. *Indiana & Michigan Electric Co.*, 318 U.S. 9, 18-19, this Court recognized that the Board is endowed with implied power to protect its processes from abuse, and to make appropriate inquiries toward that end. The exercise of such power has been deemed appropriate in the situation, *inter alia*, where an unfair labor practice charge was allegedly filed "for the purpose of effectuating the objects and designs of the Communist Party rather than to enforce the rights of an employee under

the Act" (*National Labor Relations Board* v. *Fulton Bag & Cotton Mills,* 180 F. 2d 68, 71 (C.A. 10)), where a complying union "fronts" for a non-complying union, or where a union office is concealed in order to avoid having the incumbent file an affidavit. Acquiring access to Board processes by means of a false Section 9(h) affidavit constitutes an abuse of these processes no less than in those situations. Hence, as in those cases, the Board's general and necessary power to safeguard the integrity of its processes should furnish ample basis for a Board inquiry into the genuineness of Section 9(h) affidavits clouded by doubt, and for revoking the union's compliance status if the falsity of the affidavits be established.

III

This conclusion is consistent with the scheme, history and purpose of Section 9(h).

A. The terms of the Section impose a continuing duty on the Board to withhold its processes from noncomplying labor organizations, and require the Board to declare a union out of compliance for such a "matter of happenstance" (*National Labor Relations Board* v. *Dant,* 344 U. S. 375, 383-384) as the failure of an officer to make timely renewal of his affidavit, or a change in the complement of the union's officers. Such a statutory scheme seems clearly to contemplate that the Board would investigate the sufficiency of compliance where the affidavit itself appears to be false, and declare the union out of compliance should such falsity be established. For, not only is this a more serious flouting of the purposes of Section 9(h), it is fundamental that "fraud destroys the validity of everything into which it enters." *Nudd* v. *Burrows,* 91 U. S. 426, 440. Hence,

establishing that an officer's affidavit is false in effect voids it, and, insofar as Board proceedings are concerned, it is just as though no affidavit had ever been filed.

Board power to decomply a union where its officer has filed false affidavits would, moreover, effectuate the broad objective of Section 9(h). As this Court has recognized, that Section was designed to minimize the threat of "political strikes" by "exerting pressures on unions to deny office to Communists" and other exponents of violent overthrow of the Government. *American Communications Association* v. *Douds*, 339 U. S. 382, 393. If the sole consequence of a false Section 9(h) affidavit is a criminal penalty for the officer filing the affidavit, this leverage is substantially reduced.

Should the officer, though still a Communist, be willing to file an affidavit, the union incurs no risk by keeping him in office even when, as here, its members are aware of his fraud from the outset. Similarly, should the union discover after the officer has filed an affidavit that he is still a Communist, the Act would provide no incentive for removing him from office, even where the officer's deceit has been established in criminal proceedings. To be sure, the officer may go to jail, but the union is able to keep all the benefits under the Act which it improperly acquired as a result of his wrongdoing.

On the other hand, Board power to decomply should the officer's affidavit prove false would prompt the union to keep a continuing check on its officers, and to remove a Communist officer as soon as his deceit comes to light.

B. The legislative history of Section 9(h) does not support a contrary conclusion. It discloses that the version of the provision which was originally passed by both houses of Congress forbade the granting of benefits under the Act to any labor union if its officers were members of the Communist Party or held other proscribed membership, affiliation or belief. Under that version, the Board, *prior* to conferring benefits under the Act, would have had to conduct an inquiry into whether the officers were in fact free of the disqualifying characteristics. This was changed in conference—to the present requirement that officers file disclaiming affidavits which, like other statements made to the Government, would be subject to Section 35A of the Criminal Code [18 U.S.C. 1001]—solely for the reason that Board proceedings "might be indefinitely delayed if the Board *was required* to investigate the character of all the local and national officers as well as the character of the officers of the parent body or federation" (2 Leg. Hist. of the Labor-Management Relations Act, 1947, p. 1542, emphasis added).

Congress, in order to avoid delays in Board representation and unfair labor practice proceedings, thus made it clear that such proceedings could continue once the required affidavits were on file, and that the alleged Communist character of the union involved was not open to litigation therein. However, it does not follow that there was any Congressional purpose to have this initial acceptance of affidavits preclude the Board itself, when fraud has been subsequently established in criminal or separate administrative proceedings, from altering the union's compliance status. In these latter circumstances, the Board's action does not

interrupt or otherwise delay particular unfair labor practice or representation proceedings, the problem which concerned Congress in adopting the affidavit technique. Accordingly, to read the legislative history as precluding Board power to decomply the union where the falsity of the officer's affidavit is subsequently established in separate proceedings, serves only to make the filing of affidavits, a requirement inserted solely as a means for facilitating the goal of withholding the Act's benefits from unions with Communist leadership, the ultimate end of Section 9(h); the affidavit device, which was adopted only for the purpose of easing the Board's burden in unfair labor practice and representation cases, becomes a means of lessening the union's responsibility to clean out Communist officers.

The Board's view is confirmed by a Senate report issued subsequent to the enactment of Section 9(h) (S. Doc. No. 26, 83d Cong., 1st Sess., pp. 28-29) which asserts that the false affidavit constitues an "obvious abuse" of Board processes, and that Section 9(h) does not affect the power which the Act otherwise confers upon the Board to protect its own processes from abuse.

IV

No question is now presented as to sufficiency of the evidentiary basis for the Board's findings herein. In any event, the evidence summarized in the Statement (pp. 4-9, *supra*) demonstrates that the Union was accorded a full and fair hearing, and that there is ample support for the Board's findings that all of Union officer Travis' affidavits were false, and also that the Union membership was aware of their falsity.

ARGUMENT

The instant case presents the same basic issue as that involved in the companion case, *Amalgamated Meat Cutters* v. *National Labor Relations Board,* No. 40. The Board's position on the common issue will be developed primarily in this brief, and this analysis is equally applicable to No. 40; the Board's brief in No. 40 will deal only with the specialized aspects of that case.

Section 9(h) of the National Labor Relations Act prohibits the Board from investigating a representation question involving a labor organization, or from issuing an unfair labor practice complaint based on that organization's charge, unless there is on file with the Board a non-Communist "affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit." The Section further provides that the "provisions of section 35A of the Criminal Code [18 U.S.C. 1001] shall be applicable in respect to such affidavits."

It is the position of the court below, and of the union here and in No. 40, that Congress intended the criminal penalty thus specified to be the sole consequence of a false affidavit, and to make the veracity of the affidavit irrelevant to the Board's functioning. That is, according to this view, Section 9(h) imposes on the Board the purely ministerial duty of seeing that the required affidavits are on file; if they are, the Board must accord the union the Act's benefits. Should the Board have reason to believe that its processes have been abused through the filing of false affidavits, it is powerless to conduct an administrative inquiry to determine whether

this be so. Moreover, it must continue to regard the union as in compliance with the Act even after the fraud has been established, either in an administrative proceeding (which occurred in this case) or by virtue of the officer's criminal conviction for filing a false affidavit (which occurred in No. 40).

The Board, on the other hand, believes that: (1) wholly apart from Section 9(h), it possesses implied power to protect its processes from abuse; and (2) Board power to decomply a union where an officer's affidavits prove to be false, far from being negated, is confirmed by the scheme and legislative history of Section 9(h), and effectuates its purposes. Before turning to these points, however, we shall first outline the history of the Board's efforts to protect against fraudulent compliance with Section 9(h).

I

The Board's Efforts to Protect Against Fraudulent Compliance with Section 9(h) of the National Labor Relations Act

When Section 9(h) became effective at the end of 1947, it was necessary for the Board to have a procedure which would assure that the proper union officials had filed the required affidavits, without unduly delaying the hundreds of pending cases and the additional hundreds which were anticipated in the near future. An Affidavit Compliance Branch was established within the Board to keep records of the affidavits filed, as well as of the financial and other data required by the companion Sections 9(f) and (g). (Appendix, *infra*, pp. 44-46).[8] Moreover, provisions were added to the

[8] *See National Labor Relations Board* v. *Greensboro Coca Cola Bottling Co.*, 180 F. 2d 840, 844, n. 1 (C.A. 4); Memorandum of August 19, 1947, regarding compliance with Sections 9 (f), (g) and

Board's Rules and Regulations which specified, in relation to Section 9(h), what information had to be filed, by whom, and when.[9] At the same time, the Board made it clear that the sufficiency of compliance with Section 9(h) was a matter for the Board's administrative determination and was not subject to litigation by the parties in an unfair labor practice or representation proceeding.[10]

This initial procedure rested on the assumption that compliance with Section 9(h) could be assessed simply by ascertaining whether a non-Communist affidavit had been received from every officer of the labor organization filing the unfair labor practice charge or the representation petition, and every officer of its affiliates. It was not long, however, before the Board found that additional steps were required to avoid circumvention of Section 9(h). Thus, to meet the situation where the non-complying union used a union whose officers had filed affidavits, or an individual who is not subject to the requirements of Section 9(h), as a "front," the Board concluded that benefits should not be accorded to the "fronting" party notwithstanding his nominal compliance or exemption from Section 9(h).[11] Simi-

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(h), from the General Counsel of the Board, reproduced in Appendix B to the Board's brief in *National Labor Relations Board* v. *Dant*, No. 97, October Term, 1952.

[9] Rules and Regulations of the National Labor Relations Board, Series 5 as amended, Sec. 203.13(b), and Statements of Procedure, Sec. 202.3; 29 C.F.R. §§ 102.13(b), 101.3(b). These provisions are set forth in the Appendix, *infra*, pp. 46-50.

[10] *Lion Oil Co.*, 76 NLRB 565, 566, cited with approval by the Joint Committee on Labor Management Relations, S. Rep. No. 986, Part 3, 80th Cong., 2d Sess., p. 45. See also, *National Labor Relations Board* v. *Wiltse*, 188 F. 2d 917, 923 (C.A. 6), certiorari denied *sub nom. Ann Arbor Press* v. *National Labor Relations Board*, 342 U.S. 859.

[11] See *Campbell Soup Co.*, 76 NLRB 950; *U.S. Gypsum Co.*, 77 NLRB 1098.

larly, to meet the situation where an office previously listed in the union constitution had allegedly been eliminated in order to avoid having the incumbent file a non-Communist affidavit, the Board concluded that, even though an affidavit had been received from every nominal union officer, it would administratively investigate that contention and, if it were established, declare the union out of compliance with Section 9(h) until the concealed officer had also filed an affidavit. [12]

The situation here, where the affidavits on which the union's compliance status is based turn out to be fraudulent, poses a related problem. In line with its view that compliance questions were not litigable by private parties in unfair labor practice or representation proceedings (fn. 10, *supra*), the Board, from the beginning, refused to permit litigation therein of the veracity of the affidavits. [13] Moreover, believing that a false affidavit necessitated only an invocation of the criminal sanction specified in Section 9(h), the Board did not, at the outset, even go into the question of falsity administratively; it merely referred affidavits which appeared questionable to the Department of Justice for possible criminal prosecution. [14] However,

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[12] See Rules and Regulations of the National Labor Relations Board, Series 6, Sec. 102.13(b)(3), 29 C.F.R. § 102.13(b)(3) (1956 Supp.), set forth in the Appendix, pp. 49-50, *infra*; *National Labor Relations Board* v. *Coca-Cola Bottling Co.*, 350 U.S. 264, 266-267, fn.; *Compliance Status of Local 1150, United Electrical, Radio and Machine Workers of America*, 96 NLRB 1029; *Compliance Status of Furniture Workers, Upholsterers and Woodworkers Union, Local 576, Independent*, 107 NLRB 872.

[13] See *Craddock-Terry Shoe Corp.*, 76 NLRB 842; *American Seating Co.*, 85 NLRB 269, 271-273; *Coca-Cola Bottling Co. of Louisville, Inc.*, 108 NLRB 490, 491.

[14] See *NLRB Summary of Section 9(h) Problems*, set forth in *Communist Domination of Certain Unions, Part III*, Report of the Senate Subcommittee on Labor and Labor Management Re-

by the end of 1952, certain events had occurred which led the Board to conclude that, in order to protect its processes from abuse and avoid impairment of the purposes of Section 9(h), it, too, was empowered and required to concern itself with the veracity of the affidavits.

At that time, the Department of Justice obtained its first criminal conviction against a union officer (Valenti, an official of Local 80-A of the United Packinghouse Workers) for filing a false Section 9(h) affidavit, thus confronting the Board with the problem of whether an affidavit whose falsity was not merely alleged but had been clearly established could any longer serve as a basis for Board benefits. At about the same time, a grand jury, which had been convened in New York for purposes of investigating the veracity of the Section 9(h) affidavits filed by certain officers of other unions, called to the Board's attention an apparent palpable abuse of Board processes; the grand jury issued a presentment, which was transmitted to the Board by District Judge Weinfeld, asserting that these officers, including Ben Gold of the Fur and Leather Workers Union, had declined before the grand jury to acknowledge that the affidavits they had previously filed with the Board were truthful.[15] Moreover, the veracity of the affidavits filed by Travis and other officials of respondent union were questioned in hearings conducted by a Subcommittee of the Senate Judiciary

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lations, 82d Cong., 2d Sess., pp. 6-7; Hearings before the Senate Subcommittee on Labor and Public Welfare on *Communist Domination of Unions and National Security*, 82d Cong., 2d Sess., p. 91.

[15] Although the presentment was subsequently expunged by the court, this occurred about six months after its transmittal. *Application of United Electrical Workers, et al.*, 111 F. Supp. 858 (S.D.N.Y.).

Committee (fn. 4, *supra*). And a Subcommittee of the Senate Committee on Labor and Public Welfare made plain that, in its view, Congress never intended that the provision in Section 9(h) for criminal sanctions would make the veracity of the affidavit irrelevant to the Board's functioning (see pp. 38-39, *infra*).[16]

Respecting the Valenti conviction, the Board issued an administrative order, directing the union to show cause why it should not be declared out of compliance with Section 9(h) and be deprived of any certifications which issued to it on the basis of Valenti's affidavits; and, after studying the union's response, the Board concluded that the conviction had the effect of nullifying the union's compliance status under the Act and its outstanding certifications.[17] Similarly, on December 19, 1952, following receipt of the grand jury presentment, the Board issued an administrative order reciting the facts set forth in the presentment and directing each of the union officers involved to reaffirm his Section 9(h) affidavits; the officer was advised that a failure to respond would result in a declaration that his union was not in compliance with the filing requirements of the Act. This inquiry was blocked, February

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[16] Hearings before the Senate Subcommittee on Labor and Public Welfare on *Communist Domination of Unions and National Security*, 82d Cong., 2d Sess., pp. 104-105, 114-115; *Public Policy and Communist Domination of Certain Unions*, Report of the Senate Subcommittee on Labor and Labor Management Relations, S. Doc. No. 26, 83d Cong., 1st Sess., pp. 28-29.

[17] *In re Compliance Status of Local 80A, United Packinghouse Workers of America, CIO*, 101 NLRB 1253, discussed in Seventeenth Annual Report of the National Labor Relations Board (Gov't Print. Off., 1953), p. 26; *Kind and Knox Gelatine Co.*, 101 NLRB 1255; *Consolidated Cigar Corp.*, 101 NLRB 1254; *A. Siegel & Sons*, 101 NLRB 1254, 1257; *Knox Gelatine Co.*, 101 NLRB 1256.

6, 1953, by an injunction issued by the District Court for the District of Columbia. *United Electrical Workers, et al.* v. *Herzog,* 110 F. Supp. 220, affirmed *sub nom. Farmer* v. *United Electrical Workers,* 211 F. 2d 36 (C.A. D.C.), certiorari denied, 347 U. S. 943.

Thereafter, indictments under 18 U.S.C. 1001, were returned against Ben Gold and several other union officers for filing false Section 9(h) affidavits. Of the view that these indictments, if they culminated in convictions, would affect the union's compliance status under the Act and the vitality of its Board certifications, the Board, on October 23, 1953, issued a general statement of policy respecting the indictments. It declared that, in processing representation cases involving unions whose officers have been indicted for filing false Section 9(h) affidavits, it would defer the issuance of any new certifications to those unions, pending the outcome of the criminal proceeding (18 F.R. 7185). On November 23, 1953, the effectuation of this policy was also enjoined. *Fur Workers* v. *Farmer,* 117 F. Supp. 35 (D.D.C.), affirmed 211 F. 2d 36 (C.A. D.C.), certiorari denied, 347 U.S. 943.

Finally, in April 1954, the criminal proceeding against Gold having resulted in his conviction, the Board ordered the Fur Workers to show cause why, unless Gold were removed from office, the union should not be deprived of further benefits under the Act. When the union responded, *inter alia,* by reelecting Gold to a new term as president, the Board entered an order declaring the union to be out of compliance with Section 9(h).[18] In the same period, the administrative

[18] *Compliance Status of International Fur & Leather Workers Union,* 108 NLRB 1190. The effect of Gold's conviction is directly presented in No. 40.

investigation involved here, concerning the validity of Travis' Section 9(h) affidavits, was undertaken, culminating in the decompliance determination of February 1, 1955 (pp. 4-9, *supra*). Both of these efforts were likewise checked by the courts.[19]

II

Wholly Apart from Section 9(h), the Board Possesses Implied Power to Protect Its Processes from Abuse

This Court recognized early in the history of the Act that the Board is endowed with implied power to protect its processes from abuse, and accordingly to make appropriate inquiries toward that end. Thus, in *National Labor Relations Board* v. *Indiana & Michigan Electric Co.*, 318 U. S. 9, the Court sustained a remand to the Board for the purpose of taking evidence on violence allegedly engaged in by the charging party to influence the course of the unfair labor practice proceeding. In so doing, it held that the Board (*Id.*, 18-19):

> may decline to be imposed upon or to submit its process to abuse. The Board might properly withhold or dismiss its own complaint if it should appear that the charge is so related to a course of violence and destruction, carried on for the purpose of coercing an employer to help herd its employees into the complaining union as to constitute an abuse of the Board's process.

This was reaffirmed in *National Labor Relations Board* v. *Donnelly Garment Co.*, 330 U.S. 219, 235, the Court stating that "the character of a complainant may rightfully influence the Board in entertaining a complaint."

[19] *Fur Workers* v. *Farmer*, 34 LRRM 2493 (D.D.C.), affirmed, 221 F. 2d 862 (C.A. D.C.); pp. 10-11, *supra*.

Similarly, the Court of Appeals for the Tenth Circuit recognized the existence of such power where it was contended that the Board proceeding should be dismissed because the underlying unfair labor practice charge had been filed "for the purpose of effectuating the objects and designs of the Communist Party rather than to enforce the rights of an employee under the Act." *National Labor Relations Board* v. *Fulton Bag & Cotton Mills*, 180 F. 2d 68, 71. The court, holding that this "was a matter resting in the sound discretion of the Board," pointed out that (*Ibid.*):

> * * * [the Board] may properly determine for itself whether its processes are being abused through the filing of an information based upon evil and unlawful purposes of the informer rather than a purpose to present a violation of the Act, and in exploring that question the Board may give appropriate consideration to all facts and circumstances which have material bearing. It may do that for the purpose of protecting its processes against abuse. And if it determines with reasonable foundation that its processes would be abused by filing a complaint and going forward with the proceeding, it may decline to entertain and proceed upon the charge. In like manner, if it determines later that its processes are being abused it may decline to proceed further. . . .

See also, *National Labor Relations Board* v. *Fred P. Weissman Co.*, 170 F. 2d 952, 954-955 (C.A. 6), certiorari denied, 336 U.S. 972. Cf. *United States* v. *Morton Salt Co.*, 338 U.S. 632, 642-643.

On various occasions, the Board itself has dismissed proceedings where it found that its processes had been

misused. For example, the Board has dismissed a complaint where it was shown that the charge had been filed, not for the purpose of obtaining relief from the unfair practice, but solely to further a collusive scheme between a rival union and the company, designed to oust the incumbent union. *Hollywood Ranch Market*, 93 NLRB 1147, 1153-1154. In respect to representation cases under Section 9(c) of the Act, the Board has dismissed election petitions where investigation of the membership cards submitted by the union to evidence its support among the employees revealed the lack of an authentic substantial interest (see Twentieth Annual Report of the National Labor Relations Board (Gov't Print. Off., 1956), pp. 12-13), and has revoked certifications after their issuance when it subsequently found that they were being used for discriminatory purposes (*Larus & Brother Co.*, 62 NLRB 1075; *Hughes Tool Co.*, 104 NLRB 318). See also, pp. 20-21, *supra*.

Acquiring access to Board processes by means of a false Section 9(h) affidavit constitutes an abuse of these processes no less than filing an unfair labor practice charge for improper motives, asserting a fictitious representation claim, or using a Board certification to further racial discrimination. Accordingly, no less than in these situations should the Board's general and necessary power to safeguard the integrity of its own functioning furnish ample basis for a Board inquiry into the genuineness of Section 9(h) affidavits clouded by doubt, and for revoking the union's compliance status if the falsity of the affidavits be established.[20]

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[20] The statement of the court below in *United Electrical Workers*, 211 F. 2d 36, 39, that there is no basis for "excluding the union from the Act's benefits because its officer had deceived the union

Moreover, as we shall now show, this conclusion is consistent with the scheme and history of Section 9(h).

III

Board Power to Decomply a Union When Its Officer's Affidavits Prove to be False is Consistent with the Scheme and History of Section 9(h), and Effectuates Its Purpose

A. *The terms of Section 9(h) and its purpose*

1. The terms of Section 9(h) (pp. 2-3, *supra*) impose a continuing duty on the Board to withhold its processes from noncomplying labor organizations. The Section requires each officer to renew his affidavit on file with the Board every twelve months, and because "of the fluid and elective nature of the official personnel of labor unions" (*National Labor Relations Board* v. *Dant*, 344 U.S. 375, 383) new affidavits may even have to be filed at shorter intervals. In representation cases, for example, the Section also requires that the appropriate affidavits be on file at each stage of the investigation, and the Board must therefore keep constantly alert to expiration dates of affidavits already filed and to changes in union officials, and is required, when it finds that the affidavits no longer meet the requirements of Section 9(h), to halt pending cases.[21] Furthermore,

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as well as the Board by filing a false affidavit," suggests that, if there be an abuse of Board process, the union cannot be charged with it but only the officer who filed the false affidavit. We submit that this overlooks the fact that, in filing the affidavit, the officer was acting as an agent of the union (see also, pp. 37-38, *infra*); in any event, where, as here, the union members were aware of the hoax perpetrated by the officer and nevertheless continued him in office (pp. 8-9, *supra*), there can be no question that the union has become a participant in the fraud and has itself abused the processes of the Board.

[21] See *Rite-Form Corset Co.*, 75 NLRB 174, 175; Fifteenth Annual Report of the National Labor Relations Board (Gov't Print. Off., 1950), pp. 26-27; *Tube Turns, Inc.*, 101 NLRB 528; n. 8, *supra*.

even after it has issued a certification or a bargaining order, the Board nullifies such benefit should its subsequent administrative investigation reveal that the union involved had not been in full compliance with Section 9(h) because certain of its officials who were in fact officers within the meaning of the Section, or one of its constituent parts which was in fact a separate labor organization, had failed to file affidavits.[22]

A statutory scheme which permits the Board to investigate the sufficiency of compliance in these respects, and, indeed, to declare a union out of compliance merely because an officer's affidavit has expired or the complement of officers has changed,[23] seems clearly to contemplate that the Board could investigate the sufficiency of compliance where the affidavit itself appears to be false, and declare the union out of compliance should falsity be established. See *National Labor Relations Board* v. *Sharples Chemicals, Inc.*, 209 F. 2d 645, 650-651 (C.A. 6). For not only is this a more serious flouting of the purposes of Section 9(h), but also it is fundamental that "fraud destroys the validity of everything into which it enters" (*Nudd* v. *Burrows*, 91 U.S. 426, 440). Hence, establishing that an officer's affidavit is false in effect voids it, and, insofar as Board proceedings are concerned, it is just as though no affidavit had

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[22] See n. 12, p. 21, *supra*; *Sunbeam Corp.*, 98 NLRB 525; *California Wrought Iron, Inc.*, 107 NLRB 1095; *Safrit Lumber Co., Inc.*, 108 NLRB 550. Cf. *National Labor Relations Board* v. *Highland Park Manufacturing Co.*, 341 U.S. 322.

Similar action is taken when the Board discovers a defect in compliance with the companion Sections 9(f) and 9(g). *Compliance Status of Plaster Tenders*, 111 N.L.R.B. 742; 38 L.R.R. 219.

[23] A "matter of happenstance" which often affects "unions which do have leadership willing to comply." *National Labor Relations Board* v. *Dant*, 344 U.S. 375, 383-384.

ever been filed by him; "what in form is an affidavit is merely a paper evidencing false swearing" (*National Labor Relations Board* v. *Vulcan Furniture Mfg. Corp.*, 214 F. 2d 369, 371 (C.A. 5), certiorari denied, 348 U.S. 873). Nor would the defect in compliance be averted by the circumstance that the period of a Section 9(h) affidavit is one year, and thus, by the time the fraud on one affidavit is uncovered, the officer may already have filed a new affidavit; any benefits obtained during the life of the old affidavit depend upon the validity of that affidavit and could not be "saved" by a subsequent affidavit, however valid it may be. *National Labor Relations Board* v. *Highland Park Manufacturing Co.*, 341 U.S. 322, 325.

The mere fact that Section 9(h) specifically provides that "section 35A of the Criminal Code shall be applicable in respect to such affidavits" does not indicate a contrary statutory scheme, *viz.*, that the criminal penalty was meant to be the sole sanction for a false affidavit. The affidavits would have been subject to this provision (18 U.S.C. 1001), which is applicable to false statements made to any government agency (see *United States* v. *Gilliland*, 312 U.S. 86; *United States* v. *Bramblett*, 348 U.S. 503, 504), irrespective of whether it was specifically incorporated in Section 9(h). (See *Marzani* v. *United States*, 168 F. 2d 133, 141 (C.A.D.C.), affirmed, 335 U.S. 895, 336 U.S. 922; *National Labor Relations Board* v. *Eastern Massachusetts Street Railway* (C.A. 1, July 31, 1956), 38 LRRM 2520, 2524). Existence of a criminal penalty does not normally mean that civil or administrative sanctions are excluded. See, for example, *L. P. Steuart & Bro.* v. *Bowles*, 322 U.S. 398, in which this Court held that the criminal and civil penalties specified in the Second War Powers Act did

not deprive the Office of Price Administration, to whom had been delegated the authority to allocate scarce materials conferred by that Act, of the power to protect the integrity of its rationing regulations by issuing suspension orders against, and withholding rationed materials from, violators thereof. And in *Porter* v. *Warner Holding Co.*, 328 U.S. 395, the Court upheld the power of a district court, asked to enforce a maximum rent control order, to decree restitution of the overceiling amounts, in addition to the criminal and other civil remedies which had been specified by Congress. Cf. also, *Rex Trailer Co.* v. *United States*, 350 U.S. 148; *United States* v. *LeRoy Dyal Corp.*, 186 F. 2d 460 (C.A. 3); certiorari denied, 341 U.S. 926. In short, unless Congress has indicated that the sanction it specifies is to be exclusive, there is no bar to use of other appropriate remedies consonant with the scheme and objective of the particular statute.

2. Board power to decomply a union where its officer has filed false affidavits would, moreover, effectuate the broad objective of Section 9(h). As this Court has recognized, that Section was designed to minimize the threat of "political strikes" by "exerting pressures on unions to deny office to Communists" and other exponents of violent overthrow of the Government. *American Communications Association* v. *Douds*, 339 U.S. 382, 393. See also, *Mine Workers* v. *Arkansas Flooring Co.*, 351 U.S. 62, 69-70. If the sole consequence of a false Section 9(h) affidavit is a criminal penalty for the officer filing the affidavit, this leverage is reduced to a feeble reed.

Should the officer, though still a Communist, be willing to file an affidavit,[24] the *union* incurs no risk by

[24] It is now clear that the Communist Party has long followed the policy of having its members "formally" resign without really

keeping him in office even when, as here, its members are aware of his fraud from the outset. Similarly, should the union discover after the officer has filed an affidavit that he is still a Communist, the Act would provide no incentive for removing him from office, even in cases like No. 40, where the officer's deceit has been established in criminal proceedings. To be sure, in both these cases the officer may have to go to jail, but the union is able, with impunity, to keep all the benefits under the Act which it improperly acquired as a result of his wrongdoing. The Board would even be required, where the officer admits the falsity of his affidavit at the very time he filed it with the Board (which, in effect, is the situation in this case), to honor that affidavit and accord benefits to the union based thereon. To grant benefits to a union, one of whose officers is an undenied Communist, certainly frustrates "the congressional purpose * * * to 'wholly eradicate and bar from leadership in the American labor movement, at each and every level, adherents to the Communist party and believers in the unconstituional overthrow of our Government.'" *National Labor Relations Board* v. *Highland Park Manufacturing Co.*, 341 U.S. 322, 325.

On the other hand, Board power to decomply should the officer's affidavit prove false would prompt the union to keep a continuing check on its officers, and to remove a Communist officer as soon as his deceit comes to light. The union could not afford to sit back once its officers had filed affidavits, and blind itself to their

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severing Party ties, and that this policy was specifically adopted in respect to Section 9(h) affidavits. See R. 41; *Hupman* v. *United States*, 219 F. 2d 243, 247-248 (C.A. 6), certiorari denied, 349 U.S. 953; brief for the United States in opposition, *Gold* v. *United States*, No. 137, this Term, pp. 9-15.

falsity; for, if these facts came to the Board's attention, the union would lose its compliance status under the Act and the Board benefits obtained through those affidavits.

B. *The legislative history of Section 9(h)*

The main basis for the conclusion of the court below that Congress intended to make the veracity of the Section 9(h) affidavit irrelevant to the Board's functioning is the legislative history of that Section. We do not agree that that history, on balance, supports the ruling below.

As originally reported by the House Labor Committee, H. R. 3020 contained the following provision (1 Leg. Hist. of the Labor-Management Relations Act 1947 (Gov't Print. Off., 1948), p. 63):

Sec. 9(f)

* * *

(6) No labor organization shall be certified as the representative of the employees if one or more of its national or international officers, or one or more of the officers of the organization designated on the ballot taken under subsection (d) [providing for representation elections], *is* a member of the Communist Party or by reason of active and consistent promotion or support of the policies, teachings, and doctrines of the Communist Pary can reasonably be regarded as being a member of or affiliated with such party, or believes in, or *is* a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. [Emphasis added.]

On the floor of the House, the phrase "or ever has been" was added after the italicized "is," to cover past as well as present membership (1 Leg. Hist. 190, 784, 798), and the bill passed the House in this form.

The Senate bill, S. 1126, did not contain a similar provision when reported out of committee. However, on the floor, Senator McClellan proposed to add, as Section 9(h) of the Senate bill, a provision identical to the one which had just been passed by the House (2 Leg. Hist. 1434). This amendment was agreed to, after deleting the "ever has been" phrase so as to limit the section (as was the original House version) to present membership (2 Leg. Hist. 1435-1436).

Under both the House and Senate provisions, the Board, *prior* to issuing a certification to a labor organization, would have had to conduct an inquiry into whether the officers were in fact free of the disqualifying characteristics (see 2 Leg. Hist. 1435). In the Conference Committee, the Senate provision was adopted except that, in place of an initial Board inquiry, there was substituted the present requirement that the officers file disclaiming affidavits.[25] According to a statement submitted by Senator Taft, this change was made because of "the fact that representation proceedings might be indefinitely delayed *if the Board was required* to investigate the character of all the local and national officers as well as the character of the officers of the parent body or federation" (2 Leg. Hist. 1542, emphasis added). Senator Taft added, on the floor, that (2 Leg. Hist. 1547):

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[25] The Section, which had previously been confined to representation cases, was also made applicable to unfair labor practice cases. See *National Labor Relations Board* v. *Dant*, 344 U.S. 375.

> We changed the provision regarding Communist officers. The Senate adopted an amendment which provided that no union could be certified if any of its officers were Communists . . . the way it was passed by the Senate, the whole certification might be tied up for months while determination was made as to whether a man was a Communist. Today it is provided that officers shall file statements to the effect that they are not Communists. If a man who files such a statement tells an untruth he is subject to the same statute under which Marzani was convicted last week. [p. 30, *supra*] [26]

Hence, Congress, in order to avoid delays in Board representation and unfair labor practice proceedings, made it clear that such proceedings could continue once the required affidavits were on file, and that the alleged Communist character of the union involved was not open to litigation therein.[27] However, it does not follow that there was any Congressional purpose to have this initial acceptance of affidavits preclude the Board itself, when fraud has been subsequently established in criminal or separate administrative proceedings, from altering the union's compliance status.[28]

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[26] See also, 2 Leg. Hist. 1625 (Senator Taft), 1627 (Senator Ball).

[27] See *Aerovox Corp.* v. *National Labor Relations Board*, 211 F. 2d 640 (C.A.D.C.), certiorari denied, 347 U.S. 968; *National Labor Relations Board* v. *Sharples Chemicals, Inc.*, 209 F. 2d 645, 649-651 (C.A. 6); *National Labor Relations Board* v. *Vulcan Furniture Mfg. Corp.*, 214 F. 2d 369, 371 (C.A. 5), certiorari denied, 348 U.S. 873; *American Rubber Products Corp.* v. *National Labor Relations Board*, 214 F. 2d 47, 55 (C.A. 7). Cf. *National Labor Relations Board* v. *Coca-Cola Bottling Co.*, 350 U.S. 264.

[28] That the Board may have had a more limited view of its function at the outset (pp. 20-22, *supra*), does not, of course, preclude the Board from now acting in respect to false Section 9(h)

In these latter circumstances, the Board's action does not interrupt or otherwise delay particular unfair labor practice or representation proceedings, the problem which concerned Congress in adopting the affidavit technique. Accordingly, to read the legislative history as precluding Board power to decomply the union, where the falsity of the officer's affidavit is subsequently established in separate proceedings, serves only to make the filing of affidavits, a requirement inserted solely as a means for facilitating the goal of withholding the Act's benefits from unions with Communist leadership, the ultimate end of Section 9(h); the affidavit device, which was adopted only for the purpose of easing the Board's burden in unfair labor practice and representation cases, becomes a means of lessening the union's responsibility to clean out Communist officers. On the other hand to read this history as removing the issue of the truthfulness of the affidavit merely from litigation in unfair labor practice and representation proceedings, but not otherwise making it irrelevant for continued Board benefits, gives effect to Congress' adoption of the affidavit technique, without at the same time obscuring the basic objective of Section 9(h), which is not to punish falsehood but to withhold the benefits of the Act from unions unless they rid themselves of Communist officers (pp. 31-33, *supra*).

Nor is the Board's reading of the legislative history impaired by the lower court's assumption that Congress could not have intended to vest the Board with power to decomply the union, because, if the "officer

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affidavits, provided, as we have shown, it in fact possessed such power. Cf. *United States* v. *Morton Salt Co.*, 338 U.S. 632, 647-648.

had deceived the union as well as the Board," decompliance would result in penalizing "the great mass of innocent union members" (*Farmer* v. *United Electrical Workers*, 211 F. 2d at 39). In view of the Board's findings (pp. 8-9; *supra*) that the Union members were aware of Travis' fraud from the outset, the instant case does not present the "innocent" members problem. In any event, we submit that the court's assumption is erroneous. Throughout the Congressional debates on Section 9(h) the opponents repeatedly pointed out that the very nature of the limitation was such that the "real sufferers" would be "all the union members—whether they are anti-Communist, non-Communist, or Communist."[29] Nevertheless, the majority of Congress—concluding that the danger of "political strikes" from Communist union officers was as great where the rank-and-file were unsuspecting dupes as where they were conscious followers—deliberately rejected this consideration, conditioning the union's right to access to the Board on the objective determination whether it had rid itself of Communist leaders, and without reference to the extent to which individual union members were thereby denied benefits or the degree to which individual members were guilty or innocent of responsibility for the continuance in office of the Communist leadership.

Furthermore, there is little reason why, under the scheme of the Act, the position of union members who are deceived by their officers should be any better than that of members who are misled by Board action. Thus,

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[29] 2 Leg. Hist. 1568 (Senator Murray). See also, 1 Leg. Hist. 380 (House Minority Report), 887 (Representative Madden); 2 Leg. Hist. 1559 (Senator Morse), 1584 (Senator Murray).

in the situation involved in *National Labor Relations Board* v. *Highland Park Manufacturing Co.*, 341 U. S. 322, the Board, for a period, had regarded the union as in full compliance with Section 9(h) even though the officers of its parent federation had not filed affidavits, and had accorded the union benefits under the Act; when this Court subsequently disagreed with the Board and declared that the union had never been in full compliance, the union—through no fault of its members, nor, indeed of its officers—lost all the benefits previously obtained.[30] So here, the mere fact that like consequences would result if the Board were empowered to declare a union out of compliance upon the determination of an officer's fraud, either in criminal or separate administrative proceedings, should not negate the existence of the power.

Finally, the view that Congress did not intend to preclude the Board from withdrawing the benefits of the Act when the falsity of an officer's Section 9(h) affidavit has been established in this manner is confirmed by a Senate report issued subsequent to the enactment of Section 9(h).[31] This report discussed the

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[30] See also, *National Labor Relations Board* v. *J. I. Case Co.*, 189 F. 2d 599 (C.A. 8); *National Labor Relations Board* v. *Clark Shoe Co.*, 189 F. 2d 731, 733 (C.A. 1). Alleviation of this result required a specific amendment to the Act. Act of October 22, 1951, 65 Stat. 601.

[31] *Public Policy and Communist Domination of Certain Unions*, S. Doc. No. 26, 83d Cong., 1st Sess., Report of the Subcommittee on Labor and Labor-Management Relations, March 2, 1953. The propriety of utilizing such post-legislative material has been recognized. See *Herzog* v. *Parsons*, 181 F. 2d 781, 785 (C.A.D.C.), certiorari denied, 340 U.S. 810; *National Labor Relations Board* v. *Wiltse*, 188 F. 2d 917, 922-923 (C.A. 6), certiorari denied *sub nom. Ann Arbor Press, Inc.* v. *National Labor Relations Board*, 342 U.S. 859.

steps which the Board had taken (see pp. 20-24, *supra*) to prevent circumvention of Section 9(h), including, as in the case of the *United Packinghouse Workers (Local 80A)* (101 NLRB 1253), the revocation of the union's compliance status and certifications on conviction of its officer for filing a false affidavit (Report, *op. cit.*, n. 31, pp. 8-9). It then concluded that such action is within the Board's "authority under existing law," and not inconsistent with Congress' intention to avoid Board conduct of "an independent investigation on the merits as to whether a particular 9(h) affiant is or is not a Communist" (*id.*, at 28-29).

In sum, the false affidavit constitutes an "obvious abuse" of Board processes, and Section 9(h) does not affect the power which the Act otherwise confers upon the Board (see pp. 25-28, *supra*) " 'to protect its own processes from abuse' " (*ibid.*).[82]

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[82] These conclusions are not inconsistent with the recent enactment of the Communist Control Act of 1954, 68 Stat. 775, Section 10 of which, *inter alia*, empowers the Subversive Activities Control Board to determine whether a labor organization is Communist-infiltrated, and provides that, when such finding has become "final", the union shall be deprived of benefits under the National Labor Relations Act. 68 Stat. at 778, 50 U.S.C. (1952 ed. Supp. II) 792a. This new law does not purport to repeal Section 9(h) of the National Labor Relations Act, or otherwise lessen whatever powers the Board may have had thereunder. It recognizes that, with Section 9 (h) alone, many Communist-controlled unions could still obtain Board benefits; for, to preclude them, it is necessary first to establish that their officers have filed false affidavits, a matter often difficult of proof. To meet this problem, the 1954 Act broadens the circumstances under which a union may be deemed Communist-controlled, enabling the SACB to make such determination on the basis of a variety of factors indicative of Communist leadership and control. However, from this it does not follow that the new law was designed to preclude the Board from continuing to deny benefits in any cases where, as here, the rarer evidence that an officer falsified his affidavit exists. See R. 31, fn. 10.

IV

No Question is now Presented as to the Sufficiency of the Evidentiary Basis for the Board's Findings; in any Event, Those Findings are Amply Supported

Should this Court conclude, as we have urged, that the administrative investigation conducted by the Board was within its powers under the Act, the Union will doubtless contend (Union Memorandum on Certiorari, p. 2) that the decompliance action should nevertheless be set aside because the Board's findings are not supported by the evidence and procedural irregularities occurred in the course of the hearing. This further question was not considered or reached by either the District Court or the Court of Appeals, nor was it presented as a question in the Board's petition for certiorari. In these circumstances, it would appear that this question is not before this Court now and that its resolution would necessitate a remand to the court below. See *Radio Officers' Union* v. *National Labor Relations Board*, 347 U. S. 17, 37, n. 35.

However, should the Court consider the question ripe for its adjudication at this time, we submit that the facts summarized in the Statement (pp. 5-9, *supra*) demonstrate that there is ample support for the Board's findings and that the Union was accorded a full and fair hearing. The falsity of Travis' August 1949 affidavit is patent in the light, *inter alia*, of (1) his contemporaneous statement, which, on its face, manifests his continuing support of the policies of Communism and of the Communist Party, and (2) Travis' admission to former Union official Mason that "the Party people" at Communist Party headquarters in New York had cleared that statement, and that "it

meant that while Travis was resigning his membership in the Communist Party, it would not stop or change his work for it" (pp. 6-7, *supra*).

Similarly, the fact that Travis had not altered his allegiance to the Communist Party and that his succeeding affidavits were also false, is established by Mason's uncontradicted testimony that, as late as August 1953, Travis had told Mason, who had completely severed his Party ties, that he would be "way up" in the Union if he would "rejoin the Communist Party"; moreover, Travis proceeded to reject Mason's suggestion that recognition be given to the non-Communist faction in the Union, because "the Party and my people will not stand for those proposals" (p. 8, *supra*).

The falsity of Travis' affidavits alone, we submit, would have warranted the Board's determination that the Union was not in full compliance with Section 9(h), irrespective of whether the Union members were aware of the falsity (pp. 37-38, *supra*). The evidence, however, also supports the Board's further conclusion that there was membership awareness.[33] It shows that the statement in which Travis admitted the falsity of his initial affidavit was distributed to all the Union members in the Union's official newspaper. The Union membership was particularly qualified to evaluate Travis' 1949 newspaper article and his subsequent Communist activities, in view of "the CIO's investigation of Communist domination of the Union and its final expulsion

[33] The Board found it necessary to make this additional finding because, at the time of its determination, the *United Electrical* decision of the court below had left open the possibility of Board power only in a situation where the union members were aware of the officer's fraud (p. 11, n. 6, *supra*).

from the CIO in 1950; the revolt of scores of locals from the Union over the Communist issue; the Senate Sub-Committee (Judicial Committee) investigation in 1952 of Communist affiliation of Travis and other Union leaders, and Travis' refusal at the Sub-Committee hearing in Salt Lake City to testify regarding his non-Communist affidavits; and the resulting publicity to Union members" (pp. 8-9, *supra*).[34]

[34] The Board's denial of the motion of Travis and the Union to hold a further hearing on the issue of membership awareness was proper. The basis for the ruling on this motion, which the Board viewed as a renewal of earlier motions (rejected by the Hearing Officer) to recess the hearing to various cities for the purpose of calling large numbers of Union members to testify on awareness, was that: (1) "Respondents have not supported any of their motions by any indication that they definitely have witnesses available to testify on the issues, nor by disclosure of any evidence that otherwise might be afforded. Indeed, Respondents' counsel admitted, with reference to Respondents' motion to recess the hearing to various cities for testimony by Union members, that 'this is speculative because we haven't had an opportunity to consider it and discuss it with our people.' As of this date, Respondents have shown no further preparation" (R. 29-30).

(2) Moreover, the Union, although put on notice from the outset that membership awareness was an issue in the case, had offered no evidence whatever at the hearing to disprove such awareness. Contrary to the Union's contention, this failure could not be excused by the Hearing Officer's interim ruling of June 7, (R. 71-75), holding certain rebuttal evidence to be irrelevant, for this clearly applied only to the General Counsel's alternative theory of "Aesopian language," which formed no part of the Board's ulti-

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be reversed and the case remanded to the court below.

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AUGUST, 1956.

APPENDIX

A. The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 65 Stat. 601, 29 U.S.C. 150), in addition to Section 9 (h) which is set forth at pp. 2-3, *supra*, are as follows:

REPRESENTATIVES AND ELECTIONS

Sec. 9 * * *

(f) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless such labor organization and any national or international labor organization of which such labor organization is an affiliate or constituent unit (A) shall have prior thereto filed with the Secretary of Labor copies of its constitution and bylaws and a report, in such form as the Secretary may prescribe, showing—

(1) the name of such labor organization and the address of its principal place of business;

(2) the names, titles, and compensation and allowances of its three principal officers and of any of its other officers or agents whose aggregate compensation and allowances for the preceding year exceeded $5,000, and the amount of the compensation and allowances paid to each such officer or agent during such year;

(3) the manner in which the officers and agents referred to in clause (2) were elected, appointed, or otherwise selected;

(4) the initiation fee or fees which new members are required to pay on becoming members of such labor organization;

(5) the regular dues or fees which members are required to pay in order to remain members in good standing of such labor organization;

(6) a detailed statement of, or reference to provisions of its constitution and bylaws showing the procedure followed with respect to, (a) qualification for or restrictions on membership, (b) election of officers and stewards, (c) calling of regular and special meetings, (d) levying of assessments, (e) imposition of fines, (f) authorization for bargaining demands, (g) ratification of contract terms, (h) authorization for strikes, (i) authorization for disbursement of union funds, (j) audit of union financial transactions, (k) participation in insurance or other benefit plans, and (l) expulsion of members and the grounds therefor;

and (B) can show that prior thereto it has—

(1) filed with the Secretary of Labor, in such form as the Secretary may prescribe, a report showing all of (a) its receipts of any kind and the sources of such receipts, (b) its total assets and liabilities as of the end of its last fiscal year, (c) the disbursements made by it during such fiscal year, including the purposes for which made; and

(2) furnished to all of the members of such labor organization copies of the financial report required by paragraph (1) hereof to be filed with the Secretary of Labor.

(g) It shall be the obligation of all labor organizations to file annually with the Secretary of Labor, in such form as the Secretary of Labor may prescribe, reports bringing up to date the information required to be supplied in the initial filing by subsection (f) (A) of this section, and to file with the Secretary of Labor and furnish to its members annually financial reports in the form and manner prescribed in subsection (f) (B). No labor organization shall be eligible for certification under this section as the representative of any employees, and no complaint shall issue under section 10 with respect to a charge filed by a labor organization unless it can show that it and any national or international labor organization of which it is an affiliate or constituent unit has complied with its obligation under this subsection.

B. Section 203.13(b) of the Rules and Regulations of the National Labor Relations Board, Series 5, and Section 202.3 of the Statements of Procedure, as amended August 18, 1948, 13 F.R. 4871, 4872, 29 C.F.R. §§ 102.13 (b), 101.3(b), provide:

RULES AND REGULATIONS

§ 203.13 *Compliance with section 9(f), (g) and (h) of the Act* * * *

(b) For the purpose of the regulations in this part, compliance with section 9 (h) of the Act means in the case of a national or international labor organization, that it has filed with the general counsel in Washington, D.C., and in the case of a local labor organization, that any national or international labor organization of which it is an affiliate

or constituent body has filed with the general counsel in Washington, D. C. and that the labor organization has filed with the regional director in the region in which the proceeding is pending.

(1) A declaration by an authorized representative of the labor organization executed contemporaneously with the charge (or petition) or within the preceding 12-month period, listing the titles of all offices of the filing organization and stating the name of the incumbent, if any, in each such office and date of expiration of each incumbent's term.

(2) An affidavit by each officer referred to in subparagraph (1) of this paragraph, executed contemporaneously with the charge (or petition) or within the preceding 12-month period, stating that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches the overthrow of the United States Government by force or by any illegal or unconstitutional methods.

STATEMENTS OF PROCEDURE

§ 202.3 *Compliance with section 9 (f), (g) and (h) of the Act*—If a charge (or petition) is filed by a labor organization, that labor organization and every national or international labor organization of which it is an affiliate or constituent unit must have complied with section 9(f)(b)(2) of the Act. At the time of filing the charge (or petition), or prior thereto or within a reasonable period of time

thereafter not to exceed 10 days, the labor organization must present the duplicate copy of a letter from the United States Department of Labor showing that it has filed the material required under section 9 (f) and (g) of the act and a declaration executed by an authorized agent stating the labor organization has complied with section 9(f)(b)(2) and setting forth the method by which compliance was made.

In addition, the labor organization and every national or international labor organization of which it is an affiliate or constituent unit must have complied with section 9 (h) of the act as follows: At the time of filing the charge (or petition) or prior thereto, or within a reasonable period not to exceed 10 days thereafter, the national or international labor organization shall have on file with the general counsel in Washington, D. C., and the local labor organization shall have on file with the regional director in the region in which the proceeding is pending, or in which it customarily files cases, a declaration by an authorized agent executed contemporaneously or within the preceding 12-month period listing the titles of all offices of the filing organization and stating the names of the incumbents, if any, in each such office and the date of expiration of each incumbent's term, and an affidavit from each such officer, executed contemporaneously or within the preceding 12-month period, stating that he is not a member of the Communist Party or affiliated with such party and that he does not believe in, and is not a member of nor supports any organization that believes in or

teaches the overthrow of the United States Government by force or by any illegal or unconstitutional methods.

C. Section 102.13(b) of the Rules and Regulations of the National Labor Relations Board, Series 6, March 31, 1951, and Section 101.3 of the Statements of Procedure, 16 F.R. 1938, 11636, 14 F.R. 7250-7251, 29 C.F.R. §§ 102.13(b), 101.4 (1956 Supp.) provide:

RULES AND REGULATIONS

§ 102.13 * * *

(b) [The same as § 203.13, in "B" *supra,* with this added subparagraph]

(3) The term "officer" as used in subparagraph (2) of this paragraph shall mean any person occupying a position identified as an office in the constitution of the labor organization; except, however, that where the Board has reasonable cause to believe that a labor organization has omitted from its constitution the designation of any position as an office for the purpose of evading or circumventing the filing requirements of section 9 (h) of the act, the Board may, upon appropriate notice, conduct an investigation to determine the facts in that regard, and where the facts appear to warrant such action the Board may require affidavits from persons other than incumbents of positions identified by the constitution as offices before the labor organization will be recognized as having complied with section 9(h) of the Act.

§ 101.3 [The same as § 202.3 in "B" *supra*, with this addition:]

In determining who is occupying an office and must, therefore, file an affidavit as an "officer", the Board will normally rely upon the designation of offices appearing in the constitution of the labor organization. Where, however, the Board has reasonable cause to believe that a labor organization has omitted from its constitution the designation of any position as an office for the purpose of evading or circumventing the filing requirements of section 9(h) of the act, the Board may require affidavits from additional persons.

Whenever all the requirements have been met, the Board in Washington, D. C., or the Regional Director, whichever is appropriate, issues to the labor organization appropriate notice of such compliance.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. ~~826~~ 57

BOYD LEEDOM, ET AL., *Petitioners,*

v.

INTERNATIONAL UNION OF MINE, MILL AND SMELTER WORKERS, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MEMORANDUM FOR RESPONDENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 826

BOYD LEEDOM, ET AL., *Petitioners*,

v.

INTERNATIONAL UNION OF MINE, MILL AND SMELTER WORKERS, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MEMORANDUM FOR RESPONDENT

Respondent believes that the holding below is clearly correct. However, in view of the granting of certiorari in No. 723, this Term, *Amalgamated Meat Cutters & Butcher Workmen of North America* v. *National Labor Relations Board and Lannom Manufacturing Co.*, we also believe that it would be appropriate to grant certiorari in this case and to hear it with No. 723.*

A major issue in No. 723 is whether a union's compliance status under section 9(h) of the National Labor Relations Act, as amended, is lost by virtue of the conviction, still under appeal, of one of the union's officers on charges that he filed false affidavits under 9(h). In the present case, a major issue is whether

* By a separate memorandum, we are opposing the "cross-petition" a Precision Scientific Company in No. 919, which arises out of the same litigation as this number.

the Board has power to remove a union's compliance status on an administrative determination that a union officer filed affidavits under 9(h) which were false to the knowledge of the union membership. There are, of course, other issues in this case, including the contention of respondent that the administrative determination was made without adequate evidence, on an irrational basis, and by an unfair procedure.

In view of the similarity between major issues in No. 723 and this case, we believe that the Court, having taken No. 723, might well review this case as well. In any event, this case should not be held pending disposition of No. 723. First, the issues here, though similar in certain respects, differ from those in No. 723 in other important respects. Secondly, compliance status is so vital to respondent, that it should have an opportunity to be heard by this Court. Third, in various respects, respondent's approach to the subject of decompliance as a consequence of allegedly false affidavits of a union officer differs in various aspects from the approach of the petitioner in No. 723. Finally, we believe that the Court will be assisted in determining the issues by the view of the general subject which can be obtained by reviewing both cases.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 57

BOYD LEEDOM, ET AL., AS MEMBERS OF THE NATIONAL LABOR RELATIONS BOARD, *Petitioners*,

v.

INTERNATIONAL UNION OF MINE, MILL AND SMELTER WORKERS

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT

COUNTERSTATEMENT OF THE CASE

For several years after enactment of the Labor Management Relations Act, 1947, the National Labor Relations Board repeatedly held that it had no authority to question the truth of non-Communist

affidavits filed under section 9(h) of the Act. It officially asserted that under the terms of the Act and the legislative intent, the sole sanction for a false affidavit was the criminal prosecution provided by the section itself, and that the Board had no function in the matter other than to refer suspect cases to the Department of Justice.[1] By March 18, 1952, the Board had applied this hands-off policy in 55 instances where falsification of 9(h) affidavits was alleged or suspected.[2] And on that date, the chairman of the Board told the Senate Labor Committee that Congress had "wisely spared" the Board the task of determining whether union officers were Communists. He pointed out that the Board's expertness is in the area of collective bargaining whereas investigation in the "field of subversive activities" calls for "a different sort of expertise and for special investigative techniques, not only unfamiliar to our staff but inconsistent with the open-court procedures of a quasi-judicial agency."[3]

Before the year was out, however, the Board reversed its position. In December 1952, the Board

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[1] Board decisions: *Matter of Alpert and Alpert*, 92 NLRB 806; *Matter of American Seating Co.*, 85 NLRB 269; *Matter of Craddock-Terry Shoe Corp.*, 76 NLRB 842; *Matter of Sunbeam Corp.*, 89 NLRB 469; *Matter of Sunbeam Corp.*, 93 NLRB 1205.

Board testimony before Congressional committees: Testimony of Board Chairman Herzog in *Hearings before Senate Subcommittee of Committee on Labor and Public Welfare, Communist Domination of Unions and National Security*, pp. 91, 94, 104-5 (March 18, 1952); Testimony of Board General Counsel Bott in same *Hearings*, p. 114.

Board Reports: *Fourteenth Annual Report*, p. 15; *Sixteenth Annual Report*, p. 48.

[2] *Hearings, supra*, ftn. 1, at p. 91.

[3] *Id.* at p. 94; see *infra*, pp. 13-14.

initiated a proceeding to cancel the compliance status of three unions unless they satisfied the Board that 9(h) affidavits filed by their officers were truthful. This proceeding was enjoined, the Court of Appeals for the District of Columbia holding that the Board had exceeded its authority. *Farmer* v. *United Electrical Workers*, 211 F. 2d 36, cert. denied, 347 U.S. 943.

The opinion of the Court of Appeals left open one possibility for the Board's exercise of decompliance power, by stating (at 39): "We need not decide whether the union would be barred from the Act's benefits if its membership was aware of the alleged falsity of the affidavit." This reserved point was eventually decided against the Board in February 1955 by *Farmer* v. *International Fur & Leather Workers Union*, 221 F. 2d 862.

In the meantime, however, the Board, seeking to squeeze through the possible aperture of "membership awareness," initiated the proceeding which led to this litigation.[4] On February 4, 1954, the Board ordered an "administrative investigation and hearing" to determine whether 9(h) affidavits executed between August 1949 and November 1953, inclusive, by Maurice E. Travis, the secretary-treasurer of the respondent (hereafter called the Union), were false to the knowledge of the Union's membership (R. 4, 24).

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[4] Also in the interim, the Board had been blocked in its second attempt to decomply the Fur & Leather Workers Union. The District Court enjoined the Board from suspending that union's compliance status because the union's president, Ben Gold, had been indicted on charges of having filed a false 9(h) affidavit. *Fur Workers* v. *Farmer*, 117 F. Supp. 25, cert. den. 347 U. S. 943.

After a hearing before a Board examiner, the Board on February 1, 1955, entered a Determination and Order wherein it found that the affidavits executed by Travis between August 1949 and November 1953, and also, apparently, his last 9(h) affidavit, executed on October 19, 1954,[5] were false to the knowledge of the membership of the Union. The Board ruled, accordingly, that the Union was not and had not been in compliance with the filing requirements of section 9(h), and it ordered that no further benefits under the Act be accorded the Union. (R. 23-31.)

The Board's findings were based on a public statement issued by Travis in August 1949, the time when he first signed a 9(h) affidavit. In this statement, Travis announced that he had resigned from the Communist Party in order to be able to execute the affidavit. He declared that he did not believe in or advocate the overthrow of the government by force and violence and that in his opinion neither did the Communist Party. He also said that he considered his belief in Communism to be consistent with the best interests of the members of the Union and the American people generally. (R. 76-79.)

The Board ruled that this statement "when read literally, conclusively established Travis' admission of the falsity of his initial non-Communist affidavit" in that Travis "was patently admitting the falsity of the affidavit in which he disavowed *belief* in the forceful

[5] This last affidavit, on which the Union's compliance status was based after October 19, 1954, was filed after the hearing was concluded (R. 24). Since the Board decomplied the Union for the period after October 19, 1954 (R. 31-32), it must have treated the last affidavit, on which no hearing had been held, as false to the knowledge of the Union's members.

overthrow of the Government, and *support* of the Communist Party, an organization that believes in and teaches such forceful overthrow of the Government" (R. 26, Board's emphasis). The Board reached this result by reasoning that Travis, in saying that neither he nor the Communist Party believed in violent overthrow, was thereby admitting that he did believe in violent overthrow and was also thereby supporting an organization (the Communist Party) which he knew believed in violent overthrow (R. 26-27). By this process, the Board's "literal reading" of Travis' statement transformed literal denials into admissions of the contrary.

This ingenuity would have been wasted, however, unless the Board likewise found that the 9(h) affidavits filed by Travis after 1949 were also false. Under the Act, a 9(h) affidavit has vitality for no more than twelve months. Travis' 1949 affidavit was, therefore, functus officio, and the Union's compliance status at the time of the Board's Determination and Order rested on an affidavit executed by him on October 19, 1954 (R. 4).

Whatever Travis' August 1949 statement "admitted" about the affidavit he then signed, it obviously could not admit the falsity of affidavits in the present tense filed years later. Nevertheless, the Board held that the seven affidavits executed by Travis between December 20, 1949 and October 19, 1954, were also false because there was no proof that Travis had abandoned the belief and support of violent overthrow which he had "admitted" in his August 1949 statement (R. 27).

The Board then found that the Union membership of 100,000 persons (R. 2) was aware of the falsity of

all eight affidavits executed by Travis between August 1949 and October 19, 1954. It did so on the ground that Travis' exculpatory August 1949 statement, which was "literally read" by the Board to be an admission of guilt, had been published in the Union's newspaper (R. 27-28).

The Board also held on two grounds that the Union was not entitled to offer evidence that the Union members in fact believed that Travis' affidavits were truthful. First, the Board ruled, the Union had already had its "day in court" before the hearing examiner (R. 30). The facts show, however, that the contrary was true. For the hearing examiner had refused to allow the Union to introduce such evidence on the grounds that it was irrelevant because the General Counsel for the Board had failed to make a prima facie showing on the membership awareness issue (R. 74-75).[6] The second reason given by the Board was that evidence that the Union members believed that Travis' affidavits were truthful was irrelevant to the Board's determination that the members knew that the affidavits were false. The Board stated (R. 31):

> "In any event, we are of the opinion that denials of awareness by some individual Union members could not rebut the conclusive evidence of awareness we have found from the publication and distribution of the article to the membership. Nothing probative would be added to the record

[6] This ruling, made at the close of the General Counsel's case, would, if adhered to, have been fatal to the Board's theory of power. The hearing examiner reversed his position in his recommended decision issued after the close of the hearing (R. 68-69). Thus the Union never had an opportunity to introduce the evidence it had sought to adduce.

even if individual Union members might be produced to testify (contrary to what an ordinary, reasonable person would conclude) that they did not so construe the article."

The Union sued to enjoin the Board's decompliance action, alleging that the Board had exceeded its authority, that the Board's findings were not supported by the evidence, and that the hearing was unfair because the Union had been deprived of the opportunity to offer relevant evidence on the issue of membership awareness (R. 1-7). The District Court denied a preliminary injunction (R. 10-12), and the Court of Appeals peremptorily reversed (R. 113). The District Court refused to carry out the judgment of the Court of Appeals (R. 115-119). The Court of Appeals thereupon amended its judgment so as specifically to direct the District Court to enter a preliminary injunction, and ordered issuance of its formal mandate to the District Court (R. 119-121).[7] It is this amended judgment which is under review in this case.

SUMMARY OF ARGUMENT

I.

A. The Act provides a single sanction, criminal prosecution, for falsification of a 9(h) affidavit. The Board now asserts an inherent power to decomply a union as an added consequence of falsification. Decompliance injures a union as a whole and has a disruptive effect on collective bargaining and the stability of labor relations. It is inconceivable that Congress could have left for implication a remedy so

[7] The District Court thereafter entered a preliminary injunction. There have been no further proceedings in that court.

much more drastic, far-reaching, and controversial than that which it expressly provided. The Board is seeking to create a power which requires legislation.

B. The legislative history of the Act shows that Congress meant to withhold from the Board the functions of determining whether Union officers were Communists and of decomplying unions having such officers. Congress rejected a provision which would have given the Board these functions in favor of a system of requiring union officers to file non-Communist affidavits under the penalty of perjury. The Board is now violating the intent of Congress by asserting the very power of administrative investigation and decomplian which 9(h) was designed to keep from the Board. The Board itself for years repeatedly recognized that such was the legislative intent and that criminal investigations are inconsistent with its role as a quasi-judicial agency.

The legislative history also shows that Congress believed that the criminal sanction for false 9(h) affidavits was fully adequate to implement the policy of excluding Communists from union office. Congress saw no need for the added measure of decompliance of the union.

Contrary to the Board's claim, the provision for administrative decompliance rejected by Congress was not objectionable on grounds that it required Board investigations of all union officers and made the subject of Communism litigable in regular Board proceedings. The rejected provision would have given the Board exactly the power, claimed by the Board here, of making investigations on a selective basis in ad hoc proceedings. Likewise, the Board's present de-

compliance procedure is as productive of delay as that which Congress rejected.

C. The decompliance power claimed by the Board is in several respects inconsistent with the statutory scheme and overall policy.

It is obviously incongruous for a quasi-judicial agency to undertake the functions of making criminal investigations, and it is offensive that an individual's guilt of a serious crime should be determined in an administrative proceeding.

Furthermore, decompliance is inconsistent with the overall purposes of the Act because it disrupts the stability of union-employer relationships and interferes with the democratic selection of union officers. Decompliance retroactively cancels all benefits acquired by a union under the Act for the period in which a false affidavit had compliance vitality. It invalidates union certifications and collective bargaining contracts and allows unfair labor practices to go unredressed. The possibility of a wholesale disruption by retroactive decompliance exerts pressure on unions to select their officers not by democratic preference, but according to the degree to which the individuals' political purity is above suspicion. As a practical matter, this puts unions under compulsion to reject militant or non-conformist leaders.

D. The decompliance power is inconsistent with the Communist Control Act of 1954. That Act causes unions to lose their compliance status on a finding by the Subversive Activities Control Board, sustained on judicial review, that they are "Communist-infiltrated." Congress therefore legislated a different standard for decompliance than that advanced by the

Board, entrusted determination to another agency, avoided the disastrous retroactive effects of the Board's decompliance policy, and provided for judicial review before decompliance becomes effective.

The Board's action also violated the Administrative Procedure Act because it represented ad hoc rule-making without observance of that statute's requirements of notice and publication of proposed rules.

II.

"Membership awareness" of the falsity of an officer's affidavit can not supply a decompliance power which the Board does not otherwise have. The Board itself recognizes as much.

Congress felt that the criminal penalty for false affidavits was the appropriate and adequate method for implementing the policy of excluding Communists from union office, and it meant to exclude Board investigation of the Communist issue. These considerations apply whether or not there is membership awareness, and hence that element cannot afford the Board jurisdiction.

III.

Even if the Board has the decompliance power, the judgment below is correct, since the power was wrongfully exercised in this case. The Board's findings are not supported by the evidence, and the Board excluded relevant evidence. Furthermore, a preliminary injunction was appropriate pending final determination of the litigation in view of the substantial issues involved and the irreparable injury to the Union of having decompliance effective during the litigation. These questions are not briefed, however, since the court below did not consider them. As the

Board suggests, if the Court finds that the Board has the decompliance power, it should remand the case to the court below for determination of the remaining issues.

ARGUMENT

I. THE BOARD DID NOT HAVE POWER TO INVESTIGATE THE TRUTH OF THE 9(h) AFFIDAVITS AND TO DECOMPLY THE UNION.

The decompliance power claimed by the Board is inconsistent with the terms of the Act, with the intent manifested by the legislative history, and with the statutory scheme and policy.

A. The Decompliance Power Is Inconsistent with the Act's Terms

The Act by its terms provides a single remedy for the falsification of a 9(h) affidavit, namely, criminal prosecution under section 35A of the Criminal Code (now 18 U.S.C. 1001). The Board now seeks to add a consequence of falsification which Congress did not mention. This consequence, unlike that provided in the Act, is visited not on the particular malefactor, but on the union as a whole. The Board is therefore, seeking to create a policy "as reckless as firing a shotgun into a crowd of people in an effort to stop one who is picking their pockets." *Farmer* v. *United Electrical Workers*, 211 F. 2d 36, 39.

Furthermore, the Board's sanction, unlike the Act's, has a major and disruptive impact on the process of collective bargaining and the stability of labor relations which the Act is designed to promote. It vitiates existing collective bargaining contracts, past elections and certifications of collective bargaining representatives, and past determinations of employer unfair labor practices. See *infra*, p. 19.

It is inconceivable that Congress could have left for implication a remedy so much more drastic, controversial, and far-reaching than that which it expressly provided. In applying that remedy the Board has engaged in lawmaking. The power it claims is simply too important, too extensive, and too debatable, to be conjured from a nebulous "inherent" authority of an administrative agency. Cf. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579. The elaborate decompliance scheme proposed by the Board should not be created except by legislative enactment following legislative consideration of its dubious policies.

The Board rests its claim to an inherent power of decompliance on an observation in *N.L.R.B.* v. *Indiana & Michigan Electric Co.*, 318 U.S. 9, 18-19 (cited Pet. Br. 25), that the Board "may decline to be imposed upon or to submit its process to abuse." But that case has no resemblance to this one. It did not enlarge the powers granted to the Board by the statute, but merely reminded the Board that under the statute it had a wide discretion in the issuance of complaints. Congress, however, did not leave to the Board the function of determining which labor unions could have access to the Board's processes. Instead, Congress itself determined those conditions, leaving no room for the Board to impose additional conditions, to cancel accrued benefits, and to exclude from the Act's coverage unions which qualify on Congress' terms.

B. The Legislative History Shows that Congress Intended to Withhold Decompliance Power from the Board

Moreover, it was the intention of Congress to keep from the Board the power it claims here.

As the Board's brief points out (pp. 33-35), section 9(h) was a Conference substitute for a provision contained in the reported House bill and added to the Senate bill by a floor amendment offered by Senator McClellan. The original provision would have prohibited certification of a labor organization any of whose officers was a member of the Communist Party. Section 9(h) substituted the non-Communist affidavit requirement in order to eliminate the impracticality of having the Board determine "whether a man was a Communist" (Pet. Br. 35). Unions with Communist officers were to be excluded not through the administrative process, but as a result of the threat or actuality of criminal prosecution for persons filing false affidavits.[8]

The Board's position in this case, therefore, violates the purpose and scheme of the statute. It asserts the very power of administrative investigation and decompliance which 9(h) intended to keep from the Board. That such was the intention of 9(h) was, as we have seen (*supra*, p. 2, ftn. 1), repeatedly recognized by the Board itself until, for undisclosed reasons, it suddenly and belatedly made an about turn. See material quoted in Petitioner's Brief in No. 40, pp. 13-15. What is more, the Board itself applauded the wisdom of Congress in withholding from the Board the power now claimed by it. On March 18, 1952, Board Chairman Herzog testified before a Senate Committee:

> "We doubt, however, whether it would be advisable to modify the Board's existing affirmative

[8] The legislative history is reviewed in the brief for petitioner, pp. 12-13, in the case scheduled for argument just before this case. *Amalgamated Meat Cutters* v. *N.L.R.B.*, No. 40 this Term.

> authority by conferring upon it, as suggested by some, the power and responsibility of determining whether a particular labor organization is in fact 'Communist-dominated.' As noted at the outset of this statement, Congress wisely spared the N.L.R.B. that task in 1947, although it had been imposed in earlier versions of that year's legislation. We believe that it would be a mistake to change that approach today. There are two principal reasons: First, if this Board is expert in anything, it is in the area of collective bargaining. The field of subversive activities, where proof is notoriously difficult to obtain, calls for a different sort of expertise and for special investigative techniques, not only unfamiliar to our staff but inconsistent with the open-court procedures of a quasi-judicial agency." (*Hearings before Senate Subcommittee of Committee on Labor and Public Welfare, Communist Domination of Unions and National Security, p. 94.*)

The legislative history also shows that Congress felt that the criminal penalty for a false non-Communist affidavit was sufficient to implement the policy of excluding Communists from union office, and that it recognized no need to bolster this penalty by a sanction of administrative decompliance. As Senator Taft stated in an analysis of the bill: "Under the [Conference] amendment an affidavit is sufficient for the Board's purpose and there is no delay unless an officer of the moving union refuses to file the affidavit required" (93 Cong. Rec. 7002; 2 Leg. Hist. 1625). The Conference report itself made no reference to the possibility of administrative decompliance as an additional means of implementing the exclusionary policy, and merely called attention to the fact that "if an officer of a labor organization files a false affidavit

with the Board, he will be subject to the penalties prescribed in section 35A of the Criminal Code." (House Conference Report No. 510 on H. R. 3020, 80th Cong., 1st Sess., p. 49; 1 Leg. Hist. 553). Senator Taft, when presenting the Conference Report, specifically called attention to the fact that, "The penal provisions of section 35A of the Criminal Code (U.S.C., title 18, sec. 80) are made applicable to the execution of such affidavits" (93 Cong. Rec. 6602; 2 Leg. Hist. 1542). In debate he said (93 Cong. Rec. 6604; 2 Leg. Hist. 1547):

> "Today it is provided that officers shall file statements to the effect that they are not Communists. If a man who files such a statement tells an untruth he is subject to the same statute under which Marzani was convicted last week. That seemed a fair modification to make, although it was not in the House bill."

These repeated references, and particularly the tenor of the one last quoted, indicate a satisfaction with the criminal penalty standing alone. They reflect no feeling that the penalty was inadequate to exclude Communists from union office and needed to be supplemented by police work on the part of the Board. Congress did not share the Board's view (Br. 31) that the criminal penalty is "a feeble reed" for keeping Communists out of union office.

The Board now seems to argue (Br. 34-35) that Congress' only objection to the original House provision was that it required Board investigations of all union officers and made the subject litigable in regular Board proceedings rather than in ad hoc proceedings. This argument reduces to trivia the actual purposes of Congress in substituting an affidavit re-

quirement for a system of Board determination of "whether a man was a Communist." Congress recognized, as well as did Chairman Herzog on March 18, 1952, that the Board was not equipped to investigate such subjects and that criminal investigations are "inconsistent with the open-court procedure of a quasi-judicial agency."

Furthermore, the Board's argument rests on a misreading of the rejected House provision. As we have seen, the House version was added to the Senate bill by an amendment introduced by Senator McClellan, and he stated that it contemplated selective, ad hoc inquiries. The following colloquy on the floor between Senators McClellan and Ferguson on the McClellan amendment shows that the rejected version would have given the Board precisely the authority it now claims.

> "Mr. Ferguson: How would such a matter [Communist leadership of a union] be brought before the Board? I find nothing in the amendment respecting how the question should be brought before the Board.
>
> "Mr. McClellan: I think the Board could inquire into the matter upon its own volition. I do not think it would be necessary for the Board to inquire into the case of every officer, of course; but it would be like barring a Communist from working for the Government; when it was discovered that an individual was a Communist, of course he could be discharged. . . ." (93 Cong. Rec. 5095; 2 Leg. Hist. 1435.)

Nor is it true, as the Board urges, that separate decompliance proceedings do not delay disposition of regular Board cases involving the union whose officer

accused of having filed a false affidavit. The contrary is proved by this very case. As the Board states (Br. 4), the decompliance proceeding was initiated in this case following allegations made in 1953 by the Precision Scientific Company in an unfair labor practices proceeding. A hearing examiner found on October 21, 1953, that the Company had violated the Act by refusing to bargain with the Union. The Board, however, has frozen the case at that point, having refused to consider it while the decompliance proceeding was pending and during this litigation. The result is that the Company has still not been ordered to bargain with the Union.

As for decompliance as a result of a criminal conviction of an officer for filing a false 9(h) affidavit—a power also asserted by the Board—the choice there is between delay or disruption. The delay occurs if the Board holds in abeyance, pending appeal of the conviction, cases involving the union whose officer was convicted. The disruption occurs if the Board immediately treats the union as out of compliance and thereafter the conviction is reversed on appeal. The Board states (Br. 22) that its first decompliance action was taken against a local of the United Packinghouse Workers upon the conviction of an official of that union. What it does not mention is that the official's conviction was reversed on appeal (*United States* v. *Valenti*, 207 F. 2d 242), and that the official has never been retried. Thus the Board's first venture into the area of decompliance caused an irreparable and unjust disruption of a union's bargaining relationships and rights under the Act.

C. Decompliance Is Inconsistent with the Statutory Scheme and Policy

The decompliance power claimed by the Board is in several respects inconsistent with the statutory scheme and overall policy.

1. First, it is manifestly incongruous for a quasi-judicial agency to undertake the function of making criminal investigations, and it is offensive that an individual's guilt of a serious crime should be determined in an administrative proceeding.[9] By providing for affidavits and a criminal sanction, the Act contemplates enforcement by police investigations and court prosecutions, processes which naturally exclude concurrent administrative action along identical lines. The original House provision which section 9(h) superseded would not have involved such a situation. That provision was not subject to criminal enforcement and therefore would not have produced the anomaly of Board investigation and determination of crime.

As this case vividly illustrates, there is real danger that a quasi-judicial agency will be corrupted by assuming the function of criminal investigations, particularly in the field of Communism. The Board here, in its zest to make a case against Travis and the Union, abandoned all semblance of objective consideration and made palpably dishonest findings. See *supra*, pp. 4-7.

2. Exercise of the decompliance power is inconsistent with the overall purposes of the Act because it

[9] These features are not involved in decompliance of the union as the result of a criminal conviction of the officer for falsifying a 9(h) affidavit. Decompliance for a conviction is impracticable, however, because convictions may be reversed on appeal.

disrupts the stability of union-employer relationships and interferes with the democratic selection of union officers. The Board argues (Br. 31) that the decompliance power would effectuate the "broad" anti-Communist objective of section 9(h). One must assume, however, that Congress did not mean to do so by sacrificing major values which the Act is designed to serve.

Decompliance of a union on a determination that a 9(h) affidavit is false, whether the determination is made administratively by the Board or in a criminal conviction, means retroactive cancellation of all benefits acquired by the Union under the Act during the period the affidavit had been treated as valid.

In the present case, Travis is no longer an officer of the Union, and the Union's compliance status since February 23, 1955 is acknowledged by the Board (Br. 9, ftn. 3). The Board, however, seeks to nullify all benefits acquired by the Union under the Act between August 1949 and February 23, 1955 (*ibid.*). If the Board is successful, all certifications issued to the Union during a period of five and a half years are revoked. By the same token, all contracts between the Union and employers based on certifications issued during those years are invalidated. And unfair labor practices committed against the Union or its members during that period will go unredressed.

The possibility of a wholesale disruption by retroactive decompliance may have even more pernicious effects than decompliance itself. It exerts pressure on labor unions to select officers not by democratic preference, but according to the degree to which the political purity of the individuals is above suspicion.

As a practical matter, it places unions under a compulsion to reject militant or non-conformist leaders, even though these latter are not Communists, are willing to swear that they are not, and are believed by the union membership.

D. Decompliance Is Inconsistent with the Communist Control Act, and the Board's Action Violated the Administrative Procedure Act.

1. The power claimed by the Board is inconsistent with the Communist Control Act of 1954, 68 Stat. 775. That Act causes unions to lose their compliance status under the Labor Management Relations Act on a finding by the Subversive Activities Control Board, sustained on judicial review, that they are "Communist-infiltrated."[10] This employs a different standard for decompliance than that advanced by the Board; it entrusts determination to another agency; it avoids any retroactive effects of decompliance; and it provides for judicial review before decompliance becomes effective. The Board's exercise of decompliance power goes far beyond, and is not compatible with, the measures which Congress thought desirable to eliminate Communist influence in labor unions.

2. The Board's action violated the Administrative Procedure Act. The Board created a new principle, not provided for in its existing regulations, that it would cancel the compliance status of unions upon Board determination that a 9(h) affidavit was false to the knowledge of the union membership. This was

[10] Secs. 7, 9, 10, and 11 of the Communist Control Act, 68 Stat. 777-780, 50 U.S.C. (pocket part) secs. 782 (4A) and (5), 791 (e)(3), 792a, 793.

"rule-making," as defined by section 2(c) of the Administrative Procedure Act, 5 U.S.C. 1001(2)(c). The Board, however, did not comply with section 4 of that Act, 5 U.S.C. 1003, as to notice and publication of proposed rule-making. Such ad hoc, informal rule-making and actions taken pursuant thereto are void. *Camp* v. *Herzog*, 104 F. Supp. 134.

II. "MEMBERSHIP AWARENESS" DOES NOT SUPPLY THE DECOMPLIANCE POWER.

It is apparent that the Board places little stock in any theory that membership awareness of the falsity of an officer's affidavit supplies a decompliance power which the Board would not otherwise have. The Board was driven to the theory by judicial rulings adverse to its position that falsity alone is cause for decompliance. See *supra*, p. 3. The Board's justification of the claimed power does not depend on membership awareness, and the Board itself asserts (Br. 36-38) that there is little or no reason to distinguish in favor of "innocent" members.

As we have seen, Congress felt that the filing of non-Communist affidavits under the sanction of a criminal penalty was the appropriate and adequate method for implementing the policy of excluding Communists from union office. Congress meant to exclude Board investigation of the Communist issue. Board investigation and decompliance is inconsistent with the policies and scheme of the Act. All of these considerations apply whether or not there is membership awareness, and hence the presence, actual or claimed, of that element cannot afford the Board jurisdiction. And since the Board has no power to investigate whether a 9(h) affidavit is false, it can have no power

to investigate membership awareness of falsity, the latter inquiry being dependent on the former. As stated in *Farmer* v. *International Fur & Leather Workers Union*, 221 F. 2d 862, 864:

> "The absence of authority in the Board to deprive the Union of its compliance status under § 9(h) cannot be supplied by membership awareness of the falsity of the affidavit. Congress explicitly provided a criminal penalty for false non-Communist affidavits. It assumed that this threat of criminal sanctions would be a sufficient deterrent to false swearing by union officers. If these sanctions have proved insufficient, it is for Congress, not the Board, to provide new ones."

Membership awareness is not a meaningful concept, and it is inconceivable that Congress meant to have the Board pursue such a will-o'-the-wisp. The awareness cannot be imputed to the members by virtue of the knowledge of the agent who executes the affidavit, for such vicarious knowledge is always present. But how does one establish the awareness of thousands of union members, or, for that matter, of a million or more? Obviously the members will not have a single awareness on any one subject. And is the awareness that of all the members, of most, or only of some? Inquiry into membership awareness leads only to a quagmire. So here the Board could resolve the subject only by desperate means. On the one hand it made the fatuous finding that 100,000 members of the Union knew Travis' affidavits were false because the Union newspaper published his statement affirming that one of his affidavits was true. And on the other it made the incredible ruling that evidence that the Union members believed the affidavits were truthful was

irrelevant to the inquiry of whether they were aware that the affidavits were false. See *supra*, pp. 5-7.

III. THE JUDGMENT BELOW IS SUSTAINABLE ON GROUNDS OTHER THAN THE BOARD'S LACK OF POWER.

If, contrary to our argument, the Board has the decompliance power, nevertheless, the judgment below is correct. As our statement of the case shows, the decompliance power, if it exists, was not properly exercised. The Board's findings were not supported by the evidence and rested on extravagant inferences, and the Board erroneously excluded relevant evidence offered by the Union. Moreover, the judgment below is not a final disposition of the controversy, but merely directs issuance of a preliminary injunction pending the litigation. This interim relief is clearly warranted in view of the substantial nature of the questions involved and the irreparable injury which the Union will suffer if decompliance is effective pending the litigation. *Perry* v. *Perry*, 88 App. D.C. 337, 190 F. 2d 601.

However, we do not brief these points, since we share the Board's view (Br. 40) that if the Court decides that the Board has the decompliance power, the appropriate course would be to remand to the court below to determine the remaining questions in the case.